LOCAL GOVERNMENT ANTITRUST LIABILITY: THE BOULDER DECISION

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

THE LIABILITY OF LOCAL GOVERNMENTS UNDER THE ANTITRUST LAWS

JUNE 30 AND AUGUST 31, 1982

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LOCAL GOVERNMENT ANTITRUST LIABILITY: THE BOULDER DECISION

WEDNESDAY, JUNE 30, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:12 a.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman) presiding.

Also present: Senators Hatch, Heflin, and Metzenbaum.

Staff present: W. Stephen Cannon, chief counsel for antitrust; Marcy Tiffany, chief economist and counsel for antitrust; Deborah R. Shupe, research/investigator; Wes Howard, minority counsel, Subcommittee on Agency Administration; Peter Ormsby, professional staff member.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The Committee will come to order.

Last January, the Supreme Court of the United States ruled that local governments, unlike States, could be held liable under the antitrust laws for enacting ordinances found to be anticompetitive. Specifically, the Court found that the delegation of powers to a city by the State through home rule was insufficient to shield the city with *Parker* v. *Brown* State action antitrust immunity.

This case, *Community Communications Company, Inc.* v. *the City of Boulder*, has recently been the subject of intense interest and debate among those involved in any way with local government. Speculation over the effect of *Boulder* on the numerous and varied aspects of running a city or town has been abundant. While the majority opinion suggested that this decision did not "threaten the legitimate exercise of governmental power," the dissent concluded that the Court's action would "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare."

As our witnesses will no doubt point out today, the range of local activities potentially affected by the *Boulder* decision are quite diverse, ranging from procurement, to zoning, to the operation of airports and sports arenas. It is my understanding that numerous antitrust cases naming local governments as defendants are currently pending in the Federal courts.

The purpose of this hearing is to explore the ramifications of *Boulder* and to determine what, if any, legislative response is desirable. Some antitrust and municipal law authorities cite the need

for congressional action; others suggest State legislative action may be appropriate. Still others would prefer to let the courts resolve all questions raised by this decision. I hope that our distinguished witnesses will address all three of these possibilities.

The CHAIRMAN. Our first witness is William F. Baxter, the able Assistant Attorney General in charge of the Antitrust Division.

Professor Baxter, we would be glad to hear from you.

STATEMENT OF HON. WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. BAXTER. Thank you very much, Mr. Chairman. I apologize for my voice, which is mostly gone. I will try to stay very close to the microphone.

The administration certainly shares the concern of this committee and indeed of the municipalities over the trend of recent Supreme Court decisions in this area.

The CHAIRMAN. Excuse me just a minute. Do you wish to brief your statement, or do you want to read the whole statement?

Mr. BAXTER. No. If it is satisfactory, Mr. Chairman, I would prefer that my written statement be included in the record, and I will summarize it.

The CHAIRMAN. All right. Without objection, your entire statement will be placed in the record at the end of your oral testimony, and if you will now summarize it and give us the thrust of your statement.

Mr. BAXTER. Yes, Mr. Chairman. That is what I intended to do.

We see these cases as posing a serious threat to the political structure of the States. The position of the administration, as is well-known, is enthusiastic support of Federalism and we have a distinct wish to return the 10th amendment to its appropriate place in the Constitution.

On the other hand, we find this a very difficult and complex problem. As of this point in time, the administration has no specific legislative proposal that it wishes to advance and, indeed, has not reached any final conclusion on what the best solution to this problem would be.

In talking about the problem, it is important to remember what was decided in *City of Lafayette* and in *Boulder*, and also what was not decided. Taking those two opinions together, one observes that they strongly reaffirm the State action concept; they recognize that antitrust can be displaced, at least at the State level, when the State has, by an articulated statement of policy, displaced competition and substituted some appropriate regulatory supervision. The cases also indicate that the States can delegate to the municipalities the protection of *Parker* v. *Brown*. What is left very much in doubt by the cases is the degree of specificity that is necessary in order to effectuate such a delegation in any particular situation. Finally, in *Boulder*, the only additional point that became clear, really, in *Boulder* was that the existence of home rule made no difference. Apart from that single point, *Boulder* was really just a replay of *City of Lafayette*.

What was not decided in those cases is at least as important as what was decided. Most importantly, it was not decided that anybody had violated the antitrust laws. In a brief that the Department of Justice considered submitting to the Supreme Court with respect to the *Boulder* case, we would have urged the Court not to reach the very difficult issues that it did reach. We would have urged the Court to dispose of the case instead on the very, very simple proposition that there was no antitrust violation involved and that, therefore, these difficult constitutional questions need not be reached. I regret that that approach was not followed.

There are indications in the *Boulder* case that the Supreme Court contemplates the application of a fairly flexible rule of reason to cases involving municipalities. The Court's rather pointed contrast of the decision in *Professional Engineers,* which indicated that, in the end, nothing but net competitive effects mattered, with its slightly more recent decision in the *Exxon* case, where it recognized the power to create anticompetitive conditions, at least through State law, is promising in that particular respect.

Also undecided was the question of what remedies, if any, might apply to a municipality. There is no indication so far that a municipality could be held liable for treble damages, although obviously, if there is no immunity, one has to regard that as a distinct possibility.

Another point I would like to make is that *Boulder, City of Lafayette,* and substantially all the other cases that have been brought in the last 2 years against municipalities involve unsound applications of antitrust doctrine. They are all applications of overly rigid Supreme Court rules about vertical arrangements, and it may well be the case that the best fix for this problem lies in a substantive fix of the antitrust laws rather than in some approach to the immunity or preemption problem.

There have been about 30 cases brought since *City of Lafayette* was decided in 1978, and the great majority of them involve complaints by one would-be supplier of some product or service that the city has chosen to buy from someone else, or a disgruntled individual who did not get a franchise, bringing an action against the city and the successful franchisee.

It is the view of the administration that antitrust law is and should be primarily oriented toward private conduct, and that it should not be employed to interfere with the legitimate exercise of State or municipal authority. On the other hand, one cannot say at this point that it has been so employed to this date, although there obviously are a number of ominous clouds on the horizon.

In dealing with this question, I think we also have to keep in mind that the views of the States do not correspond with the views of the cities. In the *City of Boulder* case itself, not only the State of Colorado but over 20 other States filed amicus briefs opposing the position of the city of Boulder, so that we think very careful consideration is necessary of the way in which any particular legislation would impact on the political structure of the States and the ability of the States to distribute responsibility between themselves and their various political subdivisions.

The administration proposes to keep watching, monitoring this problem very closely, and to start working at various alternative

legislative solutions that could be imagined. However, Mr. Chairman, at this time, we have no particular proposal to present to your committee.

We look forward to working with your committee on this very difficult problem, and hope that we will have an opportunity to address it again, perhaps later in this legislative session, when our own views are more clearly formed.

I think I will stop at that point, if I may, Mr. Chairman. I would be happy to respond to any questions you may have.

The CHAIRMAN. Thank you, Professor Baxter.

Professor Baxter, you make an interesting suggestion regarding use of the preemption approach as mentioned by Justice Rehnquist in his dissent in the *Boulder* case. It appears to me, however, that you also accurately identify the major problem with that approach; namely, how and where to draw the preemption line. Can you give us any additional guidance on how such an approach could be fashioned to accommodate the competing State and Federal interests you identify so well?

Mr. BAXTER. I think the drafting exercise would be a very challenging one. I do not mean to suggest at this point, as I say, any particular legislative approach, but I can imagine a piece of legislation that would combine three features—one, urging or requiring the abandonment of the oversimplified per se rules in the vertical area, in general. After all, the difficulties that the municipalities face in this regard are precisely the same difficulties and uncertainties that all of our business units throughout the United States face as a consequence of those unfortunate precedents. A second feature of it might be a rather narrow immunity provision, sheltering the political entities themselves and their officers from antitrust sanctions, and the third would be some guidance to the Court as to how preemption ought to be invoked. The concern here seems to me one that is fairly similar to the concern that underlies the commerce clause. If a State wishes to impose anticompetitive conditions on its own citizens, we should no doubt find that acceptable. The State is, after all, politically responsible to its citizens. But very frequently, a State scheme will have negative impacts well beyond its borders, and it is in precisely those circumstances that it seems to me the preemptive arguments are at their strongest. And similarly, one might be largely guided in dealing with preemption by the question of whether any anticompetitive regime a municipality has brought about has significant effects outside its boundaries and on citizens other than its own.

On the other hand, one could also take the position that unless the anticompetitive effects of a municipality spill across State boundaries, confining the municipality to its own appropriate sphere within the State is a matter for the States, and even there, Federal preemption is not necessarily appropriate.

But as I say, these, at this point, at least, are still only half-formed ideas. I know enough to assure you that the drafting problem that is involved here is an exteedingly difficult one, and I repeat that I have no particular proposal to put forward.

The CHAIRMAN. Professor Baxter, another legislative approach you mentioned is clarifying the degree of State authorization necessary in order for local governments to be protected under State

action exemption. Do you have any additional thoughts on what form such an approach might take?

Mr. BAXTER. No, I really do not. Again, trying to fashion sentences that strike the right balance between generality and specificity in that context is very difficult. And of course, where that balance lies depends heavily on one's views about Federal relationships—or, relationships within the State, I should say. My concern with that particular approach is that the exact manner of phrasing is likely to have quite significant effects on the relative political positions of the State and municipal authorities and will prove to be a very, very difficult and sensitive political issue.

The CHAIRMAN. Professor Baxter, much of the mail that I have received about the *Boulder* case from local government officials focuses on the uncertainties regarding the standard of liability for public defendants, as well as available remedies. I am sure that city attorneys, including those appearing as witnesses today, would be somewhat uneasy advising their clients about potential antitrust liabilities and remedies, when faced with the decision of whether to settle an antitrust suit in which the city was a defendant. Many make the argument that it would take years of litigation to resolve these questions left unanswered by the *Boulder* case, absent a legislative response. Do you agree with this analysis?

Mr. BAXTER. I do agree with it, but again, I would note that the uncertainties of which they speak are precisely the same uncertainties that every business unit in the United States has faced for many, many years. We have a branch of antitrust law that is unsound, that imposes uncertainties and inefficiencies throughout our economy, and I think it would be very unfortunate if we dealt with that problem, as we give certain indications that we may do, by a series of industry-specific antitrust exemptions—exemptions from the sound portions of antitrust law as well as the unsound. We had the bottlers, who came in with a very appealing case as to why they should have an exemption from some of those vertical rules. Now the cities want an even broader exemption. I am aware of other bills pending on behalf of groups. And in almost every instance, what they are seeking is relief from the uncertainties generated by these unduly rigid and sweeping vertical practice rules. And as I say, it may well be that we would best solve this problem and a lot of others by going to the heart of that matter.

The CHAIRMAN. Professor Baxter, you have noted that it is unlikely the Antitrust Division would criminally prosecute municipal officials for antitrust violations. Have you considered what circumstances would prompt the Department to bring a civil case against a public defender?

Mr. BAXTER. I think I would have to say that I have not. And I have been thinking about this problem at a much more abstract level. I have some difficulty myself imagining a case where a municipality acting at all within its appropriate sphere would be likely to take conduct that would give rise to a sensible antitrust case. And accordingly, I have difficulty imagining a case where the Antitrust Division would wish to proceed against a municipality.

Now, one can make up hypotheticals involving a mayor or city councilman entering into anticompetitive conspiracies with a number of private parties for his own self interest, breaching his

obligations to his own constituents, where I could bring an antitrust case with some enthusiasm. But those cases that come to mind all involve serious misuse by the municipal officers of their functions, rather than any arguably appropriate exercise of them.

The CHAIRMAN. Professor Baxter, in situations where the State has given general authorization, such as in the operation of airports, do you believe that after the *Boulder* case, the courts will interpret that authorization as including reasonable acts which may be inconsistent with the antitrust laws, such as limiting airport taxi service?

Mr. BAXTER. Airport taxi service—that is to say, conferring a franchise—well, that is typical of the cases we have had so far. It seems to me that if a city wants to hold a competition for the purposes of selecting a single supplier for some time period, it ought to be perfectly free to do that. The situation is no less competitive because the competition occurs for the franchise rather than occurring continuously over the passage of time, and the notion that that somehow is anticompetitive derives from a misinterpretation of section 3 of the Clayton Act, having to do with exclusive dealing in long-term contracts. So, my answer to that question is simply, without regard to the question of immunity, that the antitrust laws have not been violated.

The CHAIRMAN. Professor Baxter, I think that concludes my questioning. I wish to thank you for your appearance here today.

Mr. BAXTER. Thank you very much, Senator.

[The prepared statement of Mr. Baxter follows:]

THE PREPARED STATEMENT OF WILLIAM F. BAXTER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to discuss with you the relationship between the federal antitrust laws and local government activities. The Supreme Court's recent decision in the Boulder case, 1/ and its earlier City of Lafayette decision, 2/ have revealed numerous and complex issues in this area, issues which are of considerable significance to the political structure of the states. Some local government officials have expressed serious concerns in the wake of those decisions that fear of antitrust treble damage liability could inhibit the performance of legitimate governmental functions. It has also been suggested that the distinctions drawn by the courts between municipalities and states could interfere inappropriately with the allocation of responsibility among units of government.

The Administration is firmly committed to the concept of federalism, which lies at the core of our constitutional system. Its intent is to develop policies wherever possible that will help to restore the Tenth Amendment to its rightful stature, affording state and local governments the flexibility and freedom from federal interference they require to carry out their responsibilities. Thus, any potential for application of the antitrust laws in a manner interferring with the relationship between

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1/ Community Communications Co., Inc. v. City of Boulder, Sup. Ct. No. 80-1350 (January 13, 1982).

2/ City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

states and their political subdivisions is cause for significant concern. We appreciate, moreover, local governments' concerns about the potential for litigation costs, delay, and uncertainty stemming from the possibility of antitrust suits.

The concerns expressed by local government officials raise fundamental public policy issues, and the Department of Justice cannot and does not claim to have resolved all of the difficult questions. We recognize and share the serious concerns of local governments.

It is important to focus precisely on the issues decided by the Supreme Court in Boulder and City of Lafayette. Those decisions reaffirm that under the "state action" doctrine articulated in Parker v. Brown, 3/ and further developed in a line of subsequent cases, competitive restraints imposed by a state as sovereign are immune from the federal antitrust laws if the state has clearly articulated and affirmatively expressed a policy to limit competition and has provided for active state supervision. 4/ Where a state has authorized or directed municipal conduct pursuant to such a state policy, the municipality

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3/ 317 U.S. 341 (1943).

4/ See California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). Where private parties, rather than governmental subdivisions, impose a restraint, they must show that the restrictive conduct was compelled by state law. See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

may also be eligible for such a state action exemption from the antitrust laws. In City of Lafayette, however, the Supreme Court held that municipalities are not equated with states for this purpose and may not claim a state action exemption in the absence of a state policy to limit competition. Boulder established that home-rule municipalities enjoy no special exemption from that standard. Thus, after Boulder, home-rule cities are treated like other municipal entities under the antitrust laws, and must base any claim for antitrust immunity on a state policy.

Of equal significance are the issues the Supreme Court did not decide in Boulder and City of Lafayette. Justice Brennan's opinion for the Court in Boulder is quite explicit in this regard. First, the Court did not decide that anyone, and particularly any municipality, had violated the antitrust laws. It noted that it was unnecessary "to consider other issues regarding the applicability of the antitrust laws in . . . suits . . . against government defendants" and suggested the possibility of a flexible approach to the rule of reason in cases challenging municipal activities, observing that "'[i]t may be that certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government.'" 5/ The Court pointedly compared the Professional Engineers case, 6/ which held that antitrust analysis in private-

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5/ Slip opinion, p. 15, n. 20.

6/ National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

restraint contexts should include only net competitive effects, with the Exxon decision, 7/ which held that in the circumstances of that case, an anticompetitive effect was an insufficient basis for invalidating a state law. In his concurring opinion, Justice Stevens specifically rejected suggestions that the Court's decision with respect to antitrust immunity implied a view that the antitrust laws had been violated. He noted that the Court's 1976 plurality opinion in Cantor v. Detroit Edison Co. 8/ had emphasized "the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so." In Justice Stevens' view, the antitrust violation issue where municipalities or their officials are the defendants is "not nearly as simple as the dissenting opinion implies."

A second significant issue not determined in Boulder or City of Lafayette is what remedies might be appropriate if municipal conduct were found to constitute an antitrust violation. Despite Justice Rehnquist's observation in his Boulder dissent that avoidance of treble damages where local governmental actions are not exempt under the state action doctrine will require "a considerable feat of judicial gymnastics," 9/ the Court explicitly

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7/ Exxon Corporation v. Governor of Maryland, 437 U.S. 117 (1978).

8/ 428 U.S. 579 (1976).

9/ Slip opinion, p. 6, n. 12 (Rehnquist, J., dissenting).

left this issue open, specifically stating that "[a]s in City of Lafayette . . . we do not confront the issue of remedies appropriate against municipal officials." 10/

I should also note with respect to remedies that the Department of Justice is in a position to afford municipal officials the assurance that potential criminal liability is not a realistic concern. The Department of Justice is firmly committed to a policy of seeking criminal indictments for secret agreements among competitors to fix prices, rig bids, or allocate markets, but does not proceed by criminal prosecution where the legality of conduct is uncertain, where conduct is openly undertaken without any intention to violate the law, or when other factors indicate that criminal prosecution simply would be unfair. While I cannot say that there could be no case so exceptional as to justify criminal prosecution, perhaps where an official has covertly abetted a clearly criminal conspiracy for his own benefit, the Department of Justice is certainly not going to begin seeking indictments of municipal officials for performing their functions.

Finally, I wish to note that the antitrust charges that have been brought against municipalities have often involved vertical practices that are not, in fact, anticompetitive in a public or private context. Viewed in this light, the uncertainties which municipalities face are those long faced by all business enterprises. They are a part of our legacy of judicial excess

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10/ Ibid, p. 15, n. 20 (opinion of the Court).

in fashioning substantive antitrust doctrine in the form of rigid rules which ignore actual market consequences. The response to these uncertainties should not be to enact a series of industry-specific exemptions from all antitrust law, sound and unsound. The response should be, rather, reformulation of antitrust doctrine, a task which the courts are presently about.

As the law continues to evolve in this area, I expect that the courts will be mindful of the fundamental procompetitive purposes of the antitrust laws. The Sherman Act, which forms the heart of the antitrust laws, was aimed at private cartel structures and behavior, at self-interested combinations and conspiracies among competitors that enhanced price and restricted output. Its targets were those who wished to profit personally from a noncompetitive economic order under which individual consumers and society in general were required to pay more and forced to accept less.

In light of this understanding of the antitrust laws, the Department of Justice enforces the law against significant competitive restraints in realistically-defined economic markets, taking into account the competitive dynamics of any situation in which a competitive restraint is alleged. Where the anticompetitive effects of a practice are clear, as in the case of price-fixing among horizontal competitors, for example, no further factual inquiry or analysis is required. In other situations, where the competitive effects of an alleged restraint are ambiguous, further inquiry is necessary. Allegedly anticompetitive "vertical"

agreements between, for example, buyer and seller, licensor and licensee, or franchisor and franchisee, may enhance the vigor of the competitive process. They may be designed to achieve efficiencies or in some other way to maximize profits in a manner whose overall effect is not anticompetitive. The antitrust laws should not be distorted to outlaw practices that do not enhance price, restrain output, or have other adverse competitive effects in any realistically-defined economic market, and that seem unlikely to do so in the future, in light of available economic learning.

Moreover, the antitrust laws are oriented toward private commercial conduct. In Parker v. Brown, the Supreme Court concluded that the primary focus of the antitrust laws was on concerted private behavior and that Congress never intended that the Sherman Act be used to interdict sovereign state action. Although City of Lafayette and Boulder require that such involvement reflect state rather than purely local decision-making, I think it quite likely that the Court's apparent recognition of the basic difference between actions by private parties and actions by public officials, municipal or state, will play a role, and probably an important role, in future decisions regarding the antitrust consequences of governmental actions. Such a distinction would reflect not only the congressional concern with private conduct reflected in the legislative history, but the fundamental difference between public officials, who are politically responsible to the electorate, and purely private businesses, which are responsible only to their owners.

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Where municipal conduct unreasonably restrains commercial competition, on the other hand, there may be strong policies in favor of applying the prohibitions of the antitrust laws, absent a statewide policy to replace competition with regulation or monopoly public service. The antitrust laws reflect a fundamental public interest, and municipal conduct restraining the competition they protect would deprive consumers and businesses of competition's benefits, including lower prices and superior products and services. Consumers, businesses and local government entities could be the victims of anticompetitive conduct undertaken by other jurisdictions, and designed to provide an advantage to their citizens at the expense of their neighbors, if municipalities were free to violate the antitrust laws in the absenc of a statewide policy.

The effect on states' ability to structure the allocation of responsibility among governmental units should also be considered before granting municipalities additional antitrust immunity. Certainly with respect to the adoption of anticompetitive policies potentially having effects extending beyond a single municipality's borders, the concerns of the states do not necessarily coincide with those of municipal entities. Indeed, in the Boulder case, the State of Colorado and other states filed an amicus brief opposing the city's claim of antitrust immunity. The consequence of affording municipalities freedom to violate the antitrust laws in the absence of state authorization could be to force a state that did not approve such anticompetitive

municipal actions to tolerate them or to restrict the municipalities' authority.

The Administration has not reached a conclusion that legislation would be an inappropriate response to local governments' concerns and will continue to follow closely developments in this area. If experience does prove legislation necessary to deal with inappropriate applications of the antitrust laws to local governmental conduct, a wide variety of approaches will be available, involving complex legal and policy issues. One approach deserving consideration would be to clarify the authority of local governments in light of City of Lafayette and Boulder, making it clear that municipalities need not seek state legislation specifying in precise and lengthy detail every aspect of their activities to avail themselves of the state action exemption. Other approaches might focus on specific activities or on the remedies available against public defendants.

I would like to discuss very briefly today one approach to reconciling the competitive principles embodied in the antitrust laws with municipal authority, the preemption approach advocated by Justice Rehnquist in his Boulder dissent. A preemption approach would focus on whether a governmentally-imposed competitive restraint is preempted or invalidated by the Sherman Act in conjunction with the Supremacy Clause of the United States Constitution. Municipalities and their officials faced with a challenge of this nature would not be accused of having violated the Sherman Act. In such cases, no public treasury would risk treble damages.

Preemption as an approach has some appeal in certain contexts, but there is legitimate question whether an across-the-board preemption approach would necessarily lead to the correct accommodation of state and federal interests. From the standpoint of preserving the nation's fundamental economic policy favoring competition and free markets, the actual results of a comprehensive antitrust preemption approach to local governmental activity are largely unknowable. Some would argue that presumptions against preemption in various other contexts would result in unwarranted subjugation of the policies of the Sherman Act to local governmental decisions. Others would say that the Supreme Court's decisions in the state action area would restrict to the appropriate extent the circumstances in which local governmental decisionmaking could withstand preemption attack. I should also note that preemption focuses on the validity of governmental acts; cases involving private defendants raise complex, and to some extent different, issues.

Each of the basic approaches to the possible application of the antitrust laws to local government decision-making has its pros and cons. Whether one adopts a preemption approach or concentrates on interpreting the scope of the antitrust laws as the courts have to date, however, close attention to the real nature of the alleged restraint on competition is clearly warranted. The Department of Justice will be carefully monitoring developments in this area to determine whether the antitrust laws are being applied inappropriately to local governmental conduct. Our goal will be to ensure that the fundamental public interest in commercial competition is protected, without undue interference with the ability of states and their political subdivisions to act within their legitimate spheres.

The CHAIRMAN. Our next witness is Prof. Phillip Areeda, Harvard Law School, Cambridge, Mass.

Professor Areeda, we are very pleased to have you here. You have an excellent reputation as one of the most outstanding antitrust scholars, and we feel that your statement today will be very worthwhile.

You may proceed now. Your statement is rather brief. Do you wish to deliver it all, or how do you wish to handle it?

Mr. AREEDA. Let me go through it. I may add a few points or supplement it. It is short enough, perhaps, to give my general views.

The CHAIRMAN. If you wish to deliver it in full, just go ahead.

STATEMENT OF PROF. PHILLIP AREEDA, HARVARD LAW SCHOOL, CAMBRIDGE, MASS.

Mr. AREEDA. Thank you.

At the chairman's invitation to discuss the antitrust liability of State and local governmental bodies, I am here primarily to respond to questions posed by the committee, but it might be helpful to sketch the background very briefly, to summarize what has been happening in the lower courts as well as in the Supreme Court, to offer a prediction as to how these cases will develop, and to state the reasons for concern.

I can be brief and nontechnical because my detailed analysis of these questions has been published elsewhere. [See P. Areeda, Antitrust Law, Ch. 2B' (Little Brown & Co. 1982 Supp.); I P. Areeda & D. Turner, Antitrust Law (Little Brown & Co. 1978): P. Areeda, Antitrust Immunity For "State Action" After Lafayette, 95 Harv. L. Rev. 435 (1981).]

The Federal antitrust laws protecting competition exist side by side with Federal and local laws displacing competition in particular areas or respects. Various routes exist for resolving the inevitable collisions. At the outset, it is important to distinguish two different aspects of this problem: First, harmonizing the laws favoring and limiting competition and second, supervising the Federal or local administration of those laws.

Within the Federal Government, the courts harmonize the antitrust and regulatory regimes in accordance with the apparent will of Congress which enacted both the Sherman Act and the regulatory statute. By contrast, State activities are harmonized with the national antitrust laws through the principles of federalism. To summarize many complex and overlapping judicial decisions: Each State is free to displace the antitrust laws in favor of publicly supervised private decision making provided it does not unduly burden interstate commerce or otherwise offend the Constitution; but State laws obstructing competition mandated by the Sherman Act without substituting direct State supervision are preempted.

It is exceedingly important to see that neither antitrust liability nor antitrust damages are necessary to hold, in any particular case, that the Federal antitrust regime applies in preference to Federal or State regulatory effort. This is perfectly obvious at the Federal level where, for example, a Federal court may "invalidate" the regulation or decision of a Federal agency because it interferes with competition more than Congress intended and is therefore

beyond the authority of the officials in question. Such conclusions are routinely reached without any finding that the Federal agency or its officials have violated the antitrust laws or are liable for antitrust treble damages.

What is often overlooked is that State or local regulation interfering unduly—by whatever standard you choose—with Federal policies favoring competition can also be invalidated without any finding of antitrust liability or imposition of treble damages. In its 1980 *Midcal* decision, the Supreme Court affirmed a State court injunction preventing enforcement of a California wine-pricing statute. No antitrust liability was involved, nor was any necessary to invalidate the State-imposed program found to be inconsistent with antitrust law. The techniques for reconciling State or Federal regulatory law with Federal antitrust law are well understood, although complex, when a party resists the enforcement of State or Federal rule on the ground that it conflicts with Federal antitrust law or the commerce clause or some other constitutional provision. When the same conflict is presented to the Federal antitrust court, much confusion has developed.

Although many subtleties are involved in distinguishing the content of a statute from its administration, let me contrast, for example, a State agency's power to limit zoning with the correctness or integrity of any particular zoning restriction. Most Federal courts would readily find State zoning laws consistent with Federal antitrust policies even though zoning may work to limit competition. Unfortunately, the antitrust courts have entertained the antitrust claims of a party disappointed with a particular zoning decision who claims that the zoning officials erred on the facts or on State law, or "conspired" with the plaintiff's competitors or even amongst themselves. The prevailing approach is unwise for several reasons.

Compliance with State law by State or local officials should ordinarily be supervised by State tribunals rather than by Federal antitrust courts. Just as compliance by Federal agencies with Federal law is assured by Federal courts, so also the supervision of State and local agencies for compliance with State law should be left to State tribunals.

Second, the standard antitrust remedy of treble damages seems most inappropriate as a means for assuring that State and local officials or public bodies comply with State law. After all, it is not usually supposed that Federal agencies or officials making anticompetitive decisions that are ultimately held unauthorized are to be punished with treble damages. Similarly, subjecting State agencies or officials to punitive sanctions could impair their ability and willingness to perform their duties as well as further overburdening taxpayers.

The irony of the present situation is that the Supreme Court has left enormous room for the States to displace antitrust law if they wish but has then burdened State and local officials with heavy antitrust litigation and the threat of treble damages on the basis of a Federal antitrust court's assessment of whether public bodies or officials have exceeded their authority under State law.

Because the Supreme Court has left wide room for State anticompetitive policies authorized by State law that is intended to dis-

place the antitrust laws, the Federal antitrust courts have become enmeshed in the authority of subordinate public agencies within the States. Although authority and intention may be highly relevant in principle, requiring these determinations to be made by the antitrust court has enormous potential for mischief.

First, it invites antitrust courts to supervise the legal and factual correctness and integrity of public rulings, because incorrect or corrupt decisions are obviously not authorized by State law.

Second, given that State authority and intent need not be expressly stated, and the courts are unanimous on this, inferences will often be weak or conflicting and will almost inevitably reflect the antitrust judge's view about what constitutes wise legislative policy. Thus courts have declared, for example, that prison officials are authorized to operate prisons without competing retail stores inside, while district judges have differed on the authority of airports to adopt various standards for allocating limited on-airport space among car rental companies. Another airport was held unauthorized to limit competition among taxi companies in on-airport pickups. Other courts have differed on whether local airports were authorized to have a single fixed base operator selling gasoline and servicing airplanes or whether provision had to be made for competing operators.

The third and most serious mischief is the impulse of the antitrust courts to require specific rather than general indications of State authority. Most recently, the Supreme Court held in the *Boulder* case that home rule provisions in State laws or constitutions were insufficient manifestations of State authority to immunize the city of Boulder's regulation of cable television from the antitrust laws. The Supreme Court has thus set back by nearly a century the legal status of local government. In the 19th century, many State courts came to hold that local governments lacked power to act at all except to the extent that specific authority had been granted by State law. Such doctrines often proved inconvenient, and especially troublesome where the views of State legislatures, often rural dominated, differed from those of the citizens of major municipalities. This restrictive approach to the powers of municipal government limited the self determination of the citizens of political units smaller than the State. To alter this inconvenient and perhaps antidemocratic situation, many State constitutions or legislatures granted home rule to municipalities and thus widened somewhat the power of citizens to govern themselves locally. Now, the Supreme Court, perhaps unwittingly, has turned the clock back, by exposing local government to antitrust liability in the absence of more specific State authority than home rule provisions grant.

Even within the antitrust context, *Boulder* failed to consider several anamolies. As I have mentioned, a court often infers an immunizing State intention from a vague statute when the challenged governmental conduct seems reasonable in some sense; as in operating a prison. It seems inconsistent to infer authority from a vague statute while refusing to infer it from home rule when the challenged conduct is equally reasonable. Furthermore, given home rule, a State legislature would not have occasion to enact even the

vague legislation from which the antitrust court would otherwise infer delegated power to displace the antitrust laws.

Let me summarize my views with some brief, and perhaps provocative, points.

First, many State and local decisions are anticompetitive and, in my view, unwisely so.

Second, antitrust liability is not an essential vehicle for ultimate Federal control, through the courts or through Congress, of unduly anticompetitive State or local conduct.

Third, antitrust liability is often unwise, and the Supreme Court's approach to it in such cases as *Boulder* seems doctrinaire and insufficiently analytical.

Fourth, the Supreme Court has not finally resolved the treble damage exposure of State and local agencies or their officials. Antitrust liability does not necessarily carry with it treble damage liability [see I P. Areeda & D. Turner Antitrust Law ¶217(a)], although most commentators seem to assume that liability and damages are synonomous.

Fifth, when the antitrust challenges to State and local activity are ultimately resolved, I predict that few antitrust violations will be found. (a) Many of the complaints rest on alleged conspiracies with the antitrust plaintiff's business rivals. Few illegal conspiracies are likely to be found. [See P. Areeda, Antitrust Law ¶203.3 (1982 Supp.).] (b) Grants of exclusive franchises, which are another fertile source of litigation, seldom if ever violate the antitrust laws even when granted by a private property owner.

Sixth, nevertheless, there are legitimate grounds for concern. My predictions may be wrong. Litigation, even if successfully defended, is burdensome. And it seems unwise for the Federal antitrust courts to review State and local actions for procedural or substantive irregularities.

Seventh, I hope that the antitrust courts will work their way out of these difficulties. But a decade of litigation is likely to be involved, and we cannot be sure of the outcome.

Those are my views in very brief form. I am happy to elaborate to whatever degree the committee desires.

The CHAIRMAN. Thank you, Professor Areeda.

Under the holding in the *Boulder* case, do you believe that States will have to authorize each particular governmental decision made on a local level, or do you believe that authorization of the type of State action challenged would be adequate to satisfy the standard for antitrust immunity?

Mr. AREEDA. The answer to the first part of your question is no, not every specific regulation or act would have to be authorized by the State legislature to satisfy the apparent approach of *Boulder* and *Lafayette*. It would be sufficient that the State legislature contemplate the kind of action taken. Thus, at the first level of approximation, we would say that the State legislature clearly would have to authorize action in the general area. For example, a particular zoning restriction would flow from a State statute allowing zoning; cable television regulation would flow from a State statute allowing regulation.

Now, the puzzle, and the reason why I cannot answer your question categorically, is the degree to which authority to take a partic-

ular step—such as granting an exclusive franchise to provide taxi service at an airport—has to be specifically authorized depends upon the readiness of the antitrust court to infer authority from the general enactment of authority to run an airport.

The cases suggest that wherever the antitrust judge thinks that the public authority's behavior is reasonable, in some sense, he infers that it is authorized by a vague statute. But the attribution of authority is purely formal and has nothing whatever to do with any express legislative intent.

The CHAIRMAN. Does the *Boulder* decision suggest to you that in order to assure antitrust immunity, local governmental acts must be compelled and/or supervised by the State?

Mr. AREEDA. No, clearly not. First, the general language about State compulsion has come to be a frequently repeated cliche, although the courts do not really mean it. For example, in a rate regulation regime, the State authorities do not compel the regulated party to file any particular rate, but filing some kind of rate is essential to the operation of the State regulatory scheme. So even though it is not compelled, it is clearly immune, and the lower courts usually so hold.

Second, and quite without regard to the meaning of the compulsion language when applied to private or nongovernmental parties, it is clear from the language of Midcal that governmental agency immunity arises when its action is authorized by the State with an intent to displace the antitrust laws. If one literally required compulsion as a prerequisite to immunity, there would be no room left for the discretion of a subordinate public agency at all. Discretion implies that the agency may choose to act or not to act, and if the Federal antitrust courts insist that the State compel—that is, directly order—a local or subordinate official to do a particular thing and leave him no choice, the interference with the operation of Government would be so profound that even the most doctrinaire applicant of antitrust law would balk.

So the answer to your question, I believe, is no.

The CHAIRMAN. Professor Areeda, in light of the particular problems associated with conspiracy claims against municipalities under section 1 of the Sherman Act, because of their vague nature, do you think it appropriate to exempt local governments from conspiracy charges altogether?

Mr. AREEDA. I have not thought through the question of new legislation, which requires one to examine far out possibilities that are not at the core of the problem. At the core of the problem, I believe that antitrust law ought to ignore allegations—and I may say very easy allegations—of conspiracy between public officials and private parties. There is even one absurd case that entertained an allegation that the public officials conspired among themselves in reaching a conclusion.

At the core, there is little in the conspiracy charge. I would have hoped that the courts would see that. I have analyzed the various possibilities in detail in my 1982 book [Areeda, Antitrust Law § 203.3]. Thus, I would not see much harm in legislation. But the problem with drafting legislation is that one does not wish to immunize unintended cases, and one must consider the far out possibilities. Draftsmanship is very difficult in this area.

The CHAIRMAN. Do you think that limiting the antitrust remedy to injuncture relief would be preferable to granting an across-the-board antitrust exemption for local action?

Mr. AREEDA. Certainly, that approach would address the most serious problem, namely, the potential serious liability of public officials and agencies, and it would reserve the ability of the antitrust court to guarantee compliance or consistency with Federal law. Thus, I could see no objection to such legislation.

However, such legislation would not bring an end to the present unseemly spectacle of Federal antitrust courts deciding whether, say, a particular zoning decision was correct in all respects and thus authorized by State law. That spectacle of Federal antitrust administrative review of local activities would remain, even though damage liabilities were lifted.

Now, it is true that lifting damage liability would lessen the incentive to bring these suits, but it would not eliminate them, because many such suits are part of a bargaining or negotiating ploy amongst contending parties, seeking public favors.

The CHAIRMAN. In the *Lafayette* case, the concurrence of the Chief Justice suggested that the governmental versus proprietary interest test would be relevant in determining local antitrust liability. Do you believe that this test is a workable alternative to the holding in the *Boulder* case?

Mr. AREEDA. It is an interesting alternative. Let me state a couple things about it. One, that distinction was adopted by none of the other Justices in the Supreme Court. Two, it has been roundly criticized in the literature on the grounds that the difference between proprietary and governmental activities has proved unworkable as a matter of municipal government law in trying to decide, for example, whether a city is liable in tort for negligent conduct of its affairs. Nevertheless, the Chief Justice's opinion in *Lafayette,* expresses the significant point that business enterprises, whatever the identity of the stockholders, ought to compete on equal terms in the marketplace. I read the Chief Justice as saying that if a municipality decides to engage in the power business—that may be a bad example, because there seldom is any direct competition among power suppliers—or the banking or the grocery business, it ought to compete equally with private banks or grocers. The Chief Justice's thought is that barring very clear indications of a State's contrary intentions, those businesses ought to be conducted by the same ground rules as the private businesses with whom they compete.

Drawing the line is very difficult, but such a test does have the virtue of clearly putting on one side the regulatory functions of local government. For example, under the Chief Justice's test, cable television regulation, zoning regulation, and the like, would be almost completely immune. And probably immune would be such activities as operating public parks, which seem primarily governmental.

Of course, such a test will be very difficult to administer, and would itself be a very fruitful source of litigation.

The CHAIRMAN. Do you agree with the position of Justice Rehnquist that it will be extremely difficult for courts to exempt municipalities and their officials from treble damage liability?

Mr. AREEDA. Difficult, yes; insurmountable, no. There is a tendency to assume that an antitrust violation and damage liability are synonymous. In the volume 2 of Areeda and Turner, Antitrust Law, there is an extensive analysis of that issue, and the conclusion reached—not without difficulty—is that the courts can hold that something is a violation of antitrust law for purposes of injunction, but not for damages, or for damages but not for criminal punishment. The courts have clearly distinguished between criminal liability and civil liability, and the argument in the treatise is essentially that they can, if they are creative enough, do the same among different kinds of civil liability. But it is hardly clear that that is what the courts are going to do.

The CHAIRMAN. The distinguished Senator from Alabama, do you have any questions?

Senator HEFLIN. I do not have any questions right now, Mr. Chairman.

The CHAIRMAN. I think those are all the questions we have. Let me see if counsel has anything.

[Conferring with counsel.]

We may wish to propound some other questions to you in writing, or some other members of the committee may, if that is agreeable.

Mr. AREEDA. I am at your service, Senator.

The CHAIRMAN. Thank you very much. We appreciate your presence here.

Next we will hear from a panel composed of the following gentlemen, if they will come to the table, and I believe we have one lady here, and we are glad to have her. The Honorable Tom Moody, the mayor of Columbus, Ohio, on behalf of the National League of Cities; the Honorable Hugh Allen, the mayor of Demopolis, Ala., on behalf of the Alabama League of Municipalities; and the Honorable Janet Gray Hayes, mayor of San Jose, Calif., on behalf of the National Conference of Mayors.

We are very pleased to have you distinguished people here.

Senator HEFLIN. Mr. Chairman, I would like to make a statement about Mayor Hugh Allen, mayor of Demopolis, Ala.

The CHAIRMAN. Go right ahead, Senator.

Senator HEFLIN. Demopolis was the birthplace of my mother, and I have always kept acquainted with the activities of Demopolis, Ala. It is a city of around 10,000 in Alabama, and the mayor, Mayor Hugh Allen, is a full-time mayor, an unusual thing for a town that size in Alabama—but he devotes full time to it, and has done a remarkable job. I happened to have been in Demopolis during a time in which a flood was causing great havoc, and Mayor Allen was in the forefront and was on top of everything and did a great job. He is an outstanding businessman. He owns the Demopolis Credit Bureau and also serves as superintendent of the Demopolis Gas and Water Board. He has worked also for Pacific Finance in Demopolis. He has been awarded the Jaycee Award for Community Service, and he is a very outstanding mayor, and I welcome him to this hearing today.

The CHAIRMAN. We are very pleased to have all of you people here. We do not have other Senators to speak in detail about these other witnesses, but I am sure they qualify well, too. [Laughter.]

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN, INTRODUCING MAYOR HUGH ALLEN TO THE SENATE JUDICIARY COMMITTEE

Mr. Chairman, it is a great pleasure for me today to introduce a fellow Alabamian, Mayor Hugh Allen, to this Committee.

Mr. Allen has served as Mayor of Demopolis, Alabama since 1976, having been elected to a second term in 1980. As Mayor, he serves on the Boards of the League of Municipalities, the Interact Club, the Rotary Club, and the Chamber of Commerce. He is also a recent recipient of the Jaycee Award for Community Service.

In addition to holding the office of Mayor of Demopolis, Mr. Allen is the owner of the Demopolis Credit Bureau, and the Superintendent of the Demopolis Gas and Water Boards. Prior to his election as Mayor, he worked for Pacific Finance, Incorporated, in Demopolis.

I am confident that Mayor Allen's experience and expertise in the areas of city government and business has enabled him to prepare a fine statement, and I am certain that his testimony will be a great deal of help to this Committee in its deliberations regarding municipal antitrust liability.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Hatch, we are just beginning the panel here. Did you have any statement you wanted to make?

Senator HATCH. No, I do not, Mr. Chairman. Thank you.

The CHAIRMAN. Now, I have questions here. I presume we would first like to hear from you, if you have any statements. If you have long statements, we can put them in the record. I notice Mayor Moody has a rather long statement. Could you summarize that in just a few words for us?

STATEMENT OF A PANEL INCLUDING: HON. TOM MOODY, MAYOR, COLUMBUS, OHIO, ON BEHALF OF THE NATIONAL LEAGUE OF CITIES; ACCOMPANIED BY CYNTHIA POHLS, COUNSEL TO NATIONAL LEAGUE OF CITIES; HON. HUGH ALLEN, MAYOR, DEMOPOLIS, ALA., ON BEHALF OF THE ALABAMA LEAGUE OF MUNICIPALITIES; AND HON. JANET GRAY HAYES, MAYOR, SAN JOSE, CALIF., ON BEHALF OF THE NATIONAL CONFERENCE OF MAYORS

Mr. MOODY. Mr. Chairman and members of the committee, if it is satisfactory, I will do less than summarize, since this statement is simply 15 pages in length and contains at least in some degree matters that have already been discussed. I think it might be more helpful to the committee if I were to make some comments that are not in this statement. May I have your permission to do that?

The CHAIRMAN. All right. Without objection, your entire statement will go in the record following your oral testimony, and you may proceed to make your comments.

Mr. MOODY. Thank you, Senator.

The previous two witnesses have covered the complexities of this matter very well, and there are others here who are in a position to do it, and it is contained in our written statements.

The thing that I believe requires attention is that the real issue that we wish to make on behalf of the cities is that this is truly a matter which deserves the attention of the Congress. There are other alternatives, such as allowing the matter to be dealt with in the judicial system over a period of time. We feel that that is not a viable alternative, because it is too expensive and too uncertain. While a lot of us may make guesses about the outcome of cases—

and it is my own guess, for example, that municipalities will win most of the cases that will be filed—it is also my prediction that there will be literally thousands of those cases and the expense of defending them and the expense and delay of developing resolution to the many questions which are left unanswered in *Lafayette* and in *Boulder* will take too long and too uncertain and too expensive a course if we go that way.

Now, I might point out, Senator, as a matter of interest that a few days ago, I received from the superintendent of the division of electricity in the city of Columbus a letter telling me that he is on the Board of the American Public Power Association and submitting to me a resolution on municipal antitrust liability, which was adopted by the American Public Power Association. That organization represents more than 1,750 municipally owned electric utilities and other public power systems. My superintendent quite courteously said, "If your testimony is in agreement with ours, we would appreciate a mention of it." I am choosing to offer both his letter and this resolution of the American Public Power Association because they are not in agreement with my testimony and because I think they represent the kind of simplistic approach which we dare not take. And I am very gratified that both Professor Baxter and Professor Areeda dealt with the real issues.

I will submit these to the reporter later. It is sufficient to say that the American Public Power Association urges the Congress to remove this impediment to the free exercise of legitimate municipal functions by amending the Federal antitrust statutes to exclude from their coverage actions by municipalities.

The CHAIRMAN. Would you like for those statements to go in the record?

Mr. MOODY. Yes.

The CHAIRMAN. Without objection, they will be placed in the record at the conclusion of your remarks.

Mr. MOODY. Thank you, sir.

On behalf of the National League of Cities, for perspective, we represent some 15,000 cities which are either direct members or members by association in 49 State leagues across this country—only the State of Hawaii does not have a league and that is why there are 49 leagues.

Our position is quite different. We do not seek total immunity of cities simply because we are cities. We do not feel that the preemption doctrine is one that solves the problem. We recognize both political difficulties and legal difficulties in trying to exempt cities specifically or by definition or some other way that has not been discussed.

Senator, while my paper is long, I should like to deal with only three points in it. The recommendation of the National League of Cities is that since neither State legislation nor case-by-case litigation is likely to provide a reasonable solution to this dilemma or provide it in a reasonable time, we think the answer is in substantive amendment of the antitrust laws. We know about the reluctance of Congress to change these laws. We ourselves share feelings about the difficulties of providing a blanket exemption or, in many cases, what is essentially a publicly owned private enterprise system. We recognize what Judge Burger was saying, but that dis-

tinction that he made is perhaps a little oversimplistic as we apply it in other areas of municipal government.

But our recommendation is that the antitrust laws be amended to establish a municipal action exemption, which parallels that of the States. We are not asking for a blanket immunity but a limited exemption that would allow cities to govern without being subject to inappropriate antitrust challenges.

I would share the concern of Professor Baxter that there may be cases not now in our minds where it is appropriate to have antitrust challenges against a municipality, and we would not seek a blanket immunity against that type of activity. Under our proposals, there would be a three-part test that must be established, in order for the actions of a city to be exempt. First, the city must establish an affirmative policy of substituting regulation or monopoly public service for competition. Second, the city must actively supervise that policy. And third, the city must act within its authority under State law.

Our proposal is not intended to expand in any way the authority of local governments. Our position is simply: the States should be free to allocate governmental authority among their political subdivisions, according to their definition of appropriate governmental responsibility. We do not believe that that allocation of governmental authority between State and local subdivisions ought to be made by Federal courts or in response to Federal issues which do not have as their prime thrust the considerations of governmental allocations which we are now discussing.

Senator, one gratuitous comment. It is apparent to most longtime practitioners of municipal government that there is little understanding on the part of the judiciary or on the part of the legislative branches in either State or Federal Government about the true nature of home rule. I am delighted that Senator Metzenbaum has been able to come into the room, because he will either be able to affirm or quickly correct my statement. I refer only to the State of Ohio, where there is a strong home rule tradition. It is not by a grant of the legislature, but it was by amendment to the constitution in 1912. Therefore, we have a long experience of home rule government.

In the *Boulder* case, it was clearly one of a strong home rule city with wide powers under home rule, and yet the court rather dismissed that as a statement of neutrality, and in certain of the language elsewhere in the opinion—a statement of neutrality on the part of the State by not articulating specific instructions—elsewhere, there are hints that the court conceived that to be an imperfect or inferior grant and delegation of authority. But I would like to submit for the thinking of this committee that at least in the Ohio tradition, home rule is a delegation of sovereignty which has the capability of becoming superior to the sovereignty of the State. Now, that is heady language, and many constitutional lawyers would argue about that simply being impossible, but let me give you examples.

The State of Ohio has attempted to legislate for the provision of homes for certain mentally defective people, and has passed legislation which provided that such homes could be put in any city, in any zoning category, regardless of the zoning laws of that city.

Well, under the home rule powers that we have, we challenged that clear articulation of state policy in our courts, and it has been found that our home rule powers are superior to the action of the legislature in that regard. And, while I am not here to argue that purpose, what I should like this committee to understand is that the broad and general grant of home rule authority such as was given to Boulder—and I do not speak to the merits of the *Boulder* case at all, but only to the way home rule was treated—was not looked upon in an appropriate light by the court in my opinion. The sovereignty of cities varies considerably from one State to another, but the clear articular of policy by a State, the supervision by a State, are things which are anathema to many of us who grew up in the home rule tradition. We would argue that that home rule grant by Colorado to the city of Boulder really reflects the ultimate in sovereignty, and rather than being a statement of neutrality with regard to the intentions, it is quite the contrary; it is a clear statement that a sovereign people, through their elected representatives, may do just about whatever they want to, and they may do it at their own choice, and the legislature contemplated that different communities would reach different answers on the same issue, and that, rather than neutrality, is a recognition of individual rights and preferences.

I could be tempted to belabor the point if the committee pleased, but I shall stop at that point.

The CHAIRMAN. Thank you.

[The prepared statement of Mayor Tom Moody, with additional submissions, follows:]

STATEMENT
OF
TOM MOODY, MAYOR OF COLUMBUS, OHIO,
FOR THE
NATIONAL LEAGUE OF CITIES
JUNE 30, 1982

MR. CHAIRMAN: I AM TOM MOODY, MAYOR OF COLUMBUS, OHIO, AND PAST PRESIDENT OF THE NATIONAL LEAGUE OF CITIES. I AM APPEARING TODAY ON BEHALF OF NLC, WHICH REPRESENTS NEARLY 15,000 CITIES OF ALL SIZES THROUGH DIRECT MEMBERSHIP AND MEMBERSHIP IN OUR 49 AFFILIATED STATE MUNICIPAL LEAGUES.

WE APPRECIATE THIS OPPORTUNITY TO DISCUSS MUNICIPAL LIABILITY UNDER THE ANTITRUST LAWS. OUR PRIMARY CONCERN IS THAT, AS A RESULT OF THE SUPREME COURT'S RECENT DECISION TO BROADEN THE SCOPE OF THE ANTITRUST LAWS TO INCLUDE CITIES, STATES WILL BE FORCED TO CHANGE IN A VERY FUNDAMENTAL WAY THE RELATIONSHIP BETWEEN CITIES AND STATES IN ORDER TO ACCOMMODATE THE ANTITRUST LAWS. FOR CITIES, THE SUPREME COURT'S JANUARY 13 RULING IN COMMUNITY COMMUNICATIONS CO., INC. V. CITY OF BOULDER, 50 U.S.L.W. 4144, MEANS THAT, IN ORDER FOR GOVERNMENTAL ACTIONS OF CITIES TO BE IMMUNE FROM ANTITRUST CHALLENGE, STATE LEGISLATION MUST SPECIFICALLY AUTHORIZE THE GOVERNMENTAL ACTION IN QUESTION. THE RULING MEANS THAT CITIES ARE LIKELY TO FACE MANY ANTITRUST SUITS THAT CHALLENGE THE VERY BASIS OF THEIR GOVERNMENTAL ACTIONS AND MAY RESULT IN BROAD LIABILITY UNLESS THEY VOLUNTARILY RELINQUISH THEIR AUTHORITY TO THE STATES.

NEITHER CHOICE IS A VIABLE ONE FOR CITIES. FIRST, THE EXPENSE AND UNCERTAINTY OF YEARS OF DRAWN OUT AND COMPLICATED LITIGATION AS THE JUDICIAL BRANCH MAKES POLICY IN AN AREA OF CLEAR CONGRESSIONAL RESPONSIBILITY IS CLEARLY UNACCEPTABLE. SECOND, WHETHER THEY HAVE HAD HOME RULE POWERS FOR A HUNDRED

YEARS OR HAVE RECENTLY OBTAINED THOSE POWERS, CITIES SHOULD NOT BE EXPECTED TO RELINQUISH THAT GOVERNMENTAL POWER TO THE STATES SIMPLY ON THE BASIS OF A JUDICIAL INTERPRETATION OF THE ANTITRUST LAWS.

THE PURPOSE OF THE ANTITRUST LAWS IS TO DETER ANTI-COMPETITIVE CONDUCT BY PRIVATE PARTIES, NOT TO DICTATE THE ALLOCATION OF GOVERNMENTAL RESPONSIBILITY BETWEEN CITIES AND STATES. WE BELIEVE THAT THE BOULDER RULING IS MORE LIKELY TO IMPAIR THE ABILITY OF CITIES TO GOVERN THAN TO ENHANCE COMPETITION. IT IS DIFFICULT TO BELIEVE THAT THE PUBLIC INTEREST WILL BE SERVED BY SUBJECTING THE REGULATORY ACTIONS OF CITIES TO ANTITRUST SCRUTINY.

CITY GOVERNMENTS ARE NATURAL MONOPOLIES ESTABLISHED TO PROTECT THE HEALTH, SAFETY, AND WELFARE OF THEIR POPULATIONS. IN THE NORMAL COURSE OF GOVERNING, GOVERNMENTAL DECISIONS ARE MADE WHICH, BY THEIR VERY NATURE, RESULT IN AN ADVANTAGE FOR ONE PARTY, A DISADVANTAGE FOR ANOTHER, OR A LIMITATION IN THE OPERATIONS OF A THIRD PARTY. THERE ARE MANY AVENUES FOR CHALLENGING MUNICIPAL ACTIONS THAT MAY HAVE BEEN AFFECTED BY CORRUPT BEHAVIOR OR MAY BE THE RESULT OF ILLEGAL COLLUSION. THE LEGALITY OF ACTIONS BY CITY GOVERNMENTS OR THEIR OFFICIALS MAY BE CHALLENGED UNDER A VARIETY OF FEDERAL, STATE, AND LOCAL LAWS, SUCH AS CIVIL RIGHTS LAWS, CONFLICT OF INTEREST LAWS, PROCUREMENT LAWS, SUNSHINE LAWS, FREEDOM OF INFORMATION LAWS, PUBLIC MEETING REQUIREMENTS, AND NUMEROUS CRIMINAL AND CIVIL LAWS.

WE BELIEVE THAT CONGRESS INTENDED THE ANTITRUST LAWS TO DETER ANTICOMPETITIVE BEHAVIOR BY PRIVATE INTERESTS, NOT TO SUBJECT THE GOVERNMENTAL DECISION-MAKING PROCESS TO REVIEW. THE EXTRAORDINARY REMEDY OF TREBLE DAMAGES IS CLEAR EVIDENCE OF CONGRESS' INTENT TO DISCOURAGE PRIVATE INTERESTS FROM ENGAGING IN BEHAVIOR THAT DISTORTS THE NATURAL WORKINGS OF THE MARKETPLACE.

I. BOULDER CASE

A. Boulder Ruling

I do not wish to spend a great deal of time discussing the details of the Boulder ruling as the many legal experts appearing before the Committee today will cover that area. To us, the meaning of the Boulder ruling is simple: a city's actions, whether governmental or proprietary, may be challenged under the antitrust laws unless the state has immunized the challenged action by adopting explicit state policy of substituting regulation or monopoly public service for competition. According to the Supreme Court, when it acts under home rule powers, a city is not protected by the judicially created state action exemption because state delegation of broad authority to cities represents a state policy of neutrality on competition. The majority opinion gave no guidance, however, as to when cities should be found liable under the antitrust laws.

The Boulder ruling raised more questions than it answered. Can cities be required to pay treble damages; or will the courts define a special set of remedies for municipal actions? Must immunizing legislation be specific, mandatory, and explicit; or will the courts allow state legislatures to immunize the actions of cities through broad permissive (as opposed to mandatory) legislation? Must the states actively supervise municipal actions in order to immunize the municipal actions in question; or will the courts find that active city supervision is sufficient? Will the courts apply the rule of reason (precluding the consideration of public policy objectives when the impact of challenged actions on competition is measured) that governs private actions to city actions; or will the courts develop a special test for assessing municipal actions under the antitrust laws allowing for the consideration of the relationship between the action in question and protection of the public health, safety,

AND WELFARE? WILL THE COURTS TREAT REGULATORY REQUIREMENTS INDEPENDENTLY DEVELOPED BY CITIES AS "CONCERTED ACTION" PROHIBITED UNDER THE ANTITRUST LAWS; OR WILL THEY REFUSE TO TREAT SUCH INDEPENDENT GOVERNMENTAL ACTIONS AS AGREEMENTS FOR PURPOSES OF THE ANTITRUST LAWS? DOES THE BOULDER RULING APPLY RETROACTIVELY; OR CAN IMMUNIZING LEGISLATION IMMUNIZE EXISTING ACTIONS, AS WELL AS FUTURE ACTIONS TO BE TAKEN AFTER THE IMMUNIZING LEGISLATION IS ENACTED?

B. HISTORY OF THE STATE ACTION EXEMPTION

TO UNDERSTAND THE UNCERTAINTY THAT CITIES FACE AS A RESULT OF BOULDER AND THE IMPROBABILITY THAT THE COURTS WILL ACT BOTH REASONABLY AND EXPEDITIOUSLY TO CLARIFY THE LAW, ONE HAS ONLY TO REVIEW THE HISTORY OF THE STATE ACTION EXEMPTION. BETWEEN 1980, WHEN CONGRESS ENACTED THE SHERMAN ACT, AND 1943, WHEN THE SUPREME COURT ESTABLISHED THE STATE ACTION EXEMPTION IN PARKER V. BROWN, 317 U.S. 341 (1943), THE ANTITRUST LAWS WERE USED PRIMARILY TO PREVENT AND DETER PRIVATE ANTICOMPETITIVE CONDUCT. IN PARKER, THE SUPREME COURT ESTABLISHED THE STATE ACTION EXEMPTION, RULING THAT GOVERNMENTAL ACTIONS OF STATES ARE IMMUNE FROM CHALLENGE UNDER THE ANTITRUST LAWS. FOR THE NEXT THIRTY-TWO YEARS, THE COURT DID NOT ISSUE A SINGLE OPINION ELABORATING ON THAT RULING. IN FACT, LOWER COURTS ROUTINELY DISMISSED ANTITRUST ACTIONS AGAINST BOTH STATE AND LOCAL GOVERNMENTAL ENTITIES, SUGGESTING THAT THE IMMUNITY WAS BROAD AND THAT IT APPLIED TO BOTH CITIES AND STATES.

BEGINNING IN 1975, THE SUPREME COURT ISSUED A SERIES OF RULINGS THAT ELABORATED ON PARKER AND NARROWED THE STATE ACTION EXEMPTION. IN CITY OF LAFAYETTE V. LOUISIANA POWER AND LIGHT CO., 435 U.S. 389 (1978), THE COURT RULED IN A PLURALITY OPINION THAT CITIES ARE IMMUNE ONLY WHEN THEY ARE ACTING UNDER STATE POLICY AUTHORIZING MUNICIPAL ACTIONS IN A PARTICULAR AREA AND WHEN THE STATE LEGISLATURE CONTEMPLATED THE ACTION IN QUESTION.

As with Boulder, this ruling raised more questions than it answered for two reasons. First, it dealt with proprietary rather than governmental actions, leaving the possibility that the courts would not subject governmental actions to antitrust scrutiny. Second, a plurality rather than a majority opinion, the case did not establish a strong precedent. Chief Justice Burger created additional uncertainty by suggesting in a concurring opinion that a broad immunity should apply to all governmental actions of cities and the more limited immunity outlined by the majority opinion would apply only to proprietary actions.

Two other cases suggest how confused the existing body of law is and the problems presented by its extension to municipal actions. In California Retail Liquor Dealers Association v. Midcal Aluminium, Inc., 445 U.S. 97 (1980), the Supreme Court narrowed the state action exemption, requiring that states must actively supervise the policy in order to immunize the activity in question from challenge under the antitrust laws. For cities, this ruling may mean that states can immunize municipal actions only be establishing official policy and subjecting all affected municipal activities to state review and oversight.

In National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), the Supreme Court ruled that public policy objectives (e.g., public health, safety, and welfare) cannot be considered in assessing the overall impact of the restraint in question on competition under the rule of reason. This ruling suggests that the courts will be precluded from considering the impact of municipal actions on public health, safety, and welfare. Yet the primary function of municipal governments is to protect the public health, safety, and welfare, not to enhance competition. If the Professional Engineers standard is applied to municipal actions, government

ACTIONS WILL BE DICTATED BY THE REALITIES OF THE MARKETPLACE, RATHER THAN BY THE NEED TO PROTECT PUBLIC HEALTH, SAFETY, AND WELFARE.

II. IMPACT OF BOULDER RULING ON CITIES

A. Allocation of Governmental Authority between States and Local Governments

A LOGICAL REACTION TO THE Boulder RULING IS FOR CITIES TO REQUEST STATE LEGISLATURES TO ACT ON IMMUNIZING LEGISLATION. THIS APPROACH IS NEITHER VIABLE NOR REALISTIC FOR A NUMBER OF REASONS.

FIRST, THE ONLY WAY TO AVOID EXPOSURE TO LIABILITY UNDER THE ANTITRUST LAWS IS FOR CITIES TO ASK THEIR STATES TO ASSUME AUTHORITY OVER MATTERS THAT HAVE TRADITIONALLY BEEN OF LOCAL CONCERN. IN MANY STATES, THE HOME RULE BATTLE HAS BEEN A LONG HARD FOUGHT BATTLE. CITIES CANNOT RELINQUISH THAT AUTHORITY SIMPLY FOR THE PURPOSE OF OBTAINING WHAT IS LIKELY TO BE AN ILLUSORY ANTITRUST IMMUNITY. IN OTHER STATES, THE STATE LEGISLATURE IS CONSTITUTIONALLY DISABLED FROM LEGISLATING IN MATTERS OF LOCAL CONCERN AND THEREFORE CANNOT ENACT IMMUNIZING LEGISLATION. IN SUCH STATES, THE STATE IS PROHIBITED FROM ENACTING IMMUNIZING LEGISLATION UNLESS THE STATE CONSTITUTION IS AMENDED.

SECOND, ACTIVE STATE SUPERVISION OF MUNICIPAL ACTIONS MAY BE NECESSARY FOR LEGISLATION TO IMMUNIZE THOSE ACTIONS. IN California Retailer Liquor Dealers Association v. Midcal Aluminium, Inc., 445 U.S. 97 (1980), THE SUPREME COURT RULED THAT ACTIVE STATE SUPERVISION OF THE ACTIVITY IN QUESTION IS NECESSARY TO SATISFY THE REQUIREMENTS OF THE STATE ACTION EXEMPTION. IF THE COURTS APPLY THIS REQUIREMENT LITERALLY, IMMUNIZING STATE LEGISLATION MAY BE REQUIRED TO ESTABLISH STATE BOARDS AND AGENCIES TO REVIEW AND OVERSEE MUNICIPAL ACTIONS. CITIES AND STATES ARE LIKELY TO OBJECT TO SUCH A BUREAUCRATIC REQUIREMENT: IT WILL MAKE CITY GOVERNMENTS NO MORE THAN

APPENDAGES OF STATE GOVERNMENT, AT GREAT ADDITIONAL COSTS TO THE STATES.

THIRD, THE BOULDER RULING FAILS TO DEFINE THE ELEMENTS OF IMMUNIZING STATE LEGISLATION. AS A RESULT, STATE LEGISLATION DESIGNED TO IMMUNIZE CITY ACTIONS IS AS LIKELY TO BE SUBJECT TO COURT CHALLENGES AS ARE MUNICIPAL ACTIONS THAT HAVE NOT BEEN SPECIFICALLY AUTHORIZED BY STATE LEGISLATION. FOR EXAMPLE, IF STATE LEGISLATION IS BROADLY DRAFTED AND SIMPLY ALLOWS CITIES TO REGULATE IN A CERTAIN AREA, THE COURTS MAY FIND IT UNACCEPTABLE. THE COURTS COULD, IN THEORY, REQUIRE THAT IMMUNIZING STATE LEGISLATION MUST MANDATE SPECIFIC MUNICIPAL ACTIONS.

FOURTH, WHETHER STATE LEGISLATION CAN IMMUNIZE MUNICIPAL ACTIONS WHICH OCCURRED BEFORE THE STATE LAW WAS PASSED IS VERY QUESTIONABLE. IN THAT CASE, PREEXISTING REGULATORY REQUIREMENTS AND ARRANGEMENTS COULD BE SUBJECT TO ANTITRUST CHALLENGE.

B. CASE-BY-CASE LITIGATION

AN ALTERNATIVE TO IMMUNIZING STATE LEGISLATION IS THE EQUALLY RISKY COURSE OF CASE-BY-CASE LITIGATION. UNDER THIS APPROACH, CITIES WOULD SIMPLY RELY ON THE COURTS ESTABLISHING A REASONABLE BODY OF LAW, UNFORTUNATELY A RISKY PROPOSITION. WHILE THE COURTS SLOWLY DEVELOP A BODY OF LAW IN THIS AREA, CITIES WOULD BE SUBJECT TO A GREAT DEAL OF UNCERTAINTY. SUCH LITIGATION WOULD SLOW DOWN AND DISRUPT THE DECISION-MAKING PROCESSES OF CITIES AND CAUSE THEM A GREAT DEAL OF EXPENSE. (E.G., ATTORNEYS' FEES, SETTLEMENT COSTS, DAMAGES, AND THE COST OF CHANGING MUNICIPAL POLICY).

WE FIND IT HARD TO BELIEVE THAT THE COURTS WILL DEVELOP A COHERENT BODY OF LAW IN A RELATIVELY SHORT TIME PERIOD. BECAUSE THE CONCEPT OF SUBJECTING MUNICIPAL ACTIONS TO ANTITRUST SCRUTINY IS SO UNSOUND (MUNICIPAL GOVERNMENTS SIMPLY CANNOT OPERATE IN A COMPETITIVE WAY IN MANY AREAS), THE COURTS ARE LIKELY TO FIND THE TASK OF DEVELOPING A COHERENT AND CONSISTENT BODY OF LAW VIRTUALLY IMPOSSIBLE.

FOR PURPOSES OF COMPARISON, I WOULD LIKE TO CITE THE

COURTS' STRUGGLE TO DEVELOP A COHERENT BODY OF LAW UNDER THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. s 1983. THAT STATUTE, WHICH WAS DESIGNED TO PROVIDE A REMEDY FOR UNCONSTITUTIONAL ACTIONS OF PERSONS ACTING UNDER THE AUTHORITY OF STATES OR LOCAL GOVERNMENTS, WAS DIRECTED AT GOVERNMENTAL TYPES OF ACTIONS. IT HAS BEEN ESTIMATED THAT APPROXIMATELY 23,000 SUITS ALLEGING SECTION 1983 CLAIMS WERE BROUGHT AGAINST STATES AND LOCAL GOVERNMENTS OR THEIR OFFICIALS IN 1981. IN 1961, ONLY 270 SUCH CASES WERE FILED. AS A RESULT, STATES AND LOCALITIES HAVE HAD TO ASSUME NEW COST BURDENS (E.G., LITIGATION COSTS, SETTLEMENT COSTS, ATTORNEYS' FEES FOR SUCCESSFUL PLAINTIFFS, AND DAMAGES) THAT GREATLY DISRUPT THEIR GOVERNMENTAL DECISION-MAKING PROCESS.

THE COURTS HAVE YET TO DEVELOP A COHERENT BODY OF LAW FOR JUDGING MUNICIPAL ACTIONS UNDER THIS STATUTE. FIRST, THE COURTS REFUSED TO SUBJECT LOCAL GOVERNMENTS (AS DISTINCT FROM THEIR OFFICIALS) TO ITS STRICTURES; THEN IN 1978 THEY REVERSED AN EARLIER RULING AND EXTENDED COVERAGE TO LOCALITIES. THE SCOPE OF THE LAW HAS BEEN EXPANDED, EXTENDING ITS COVERAGE TO VIOLATIONS OF FEDERAL LAWS AS WELL AS CONSTITUTIONAL REQUIREMENTS. LOCALITIES HAVE BEEN DENIED CERTAIN DEFENSES SUCH AS THE GOOD FAITH DEFENSE. ON THE OTHER HAND, THE SUPREME COURT HAS RULED THAT CITIES CANNOT BE LIABLE FOR PUNITIVE DAMAGES. I COULD GO ON IN THIS VEIN AT GREAT LENGTH, DESCRIBING IN MORE DETAIL THE INCONSISTENCIES OF SECTION 1983 REQUIREMENTS AND THE DIFFICULTY OF DEFENDING THESE ACTIONS WHEN THE LAW IS CONSTANTLY CHANGING.

I BRING UP SECTION 1983 ONLY TO DESCRIBE THE IMPACT ON CITIES OF SUBJECTING THEM TO LIABILITY UNDER A LOOSELY WRITTEN STATUTE, PROBABLY NOT DESIGNED TO APPLY TO LOCALITIES AND THEREFORE NOT DRAFTED TO TAKE INTO ACCOUNT THE SPECIAL PROBLEMS CAUSED BY SUBJECTING CITIES TO ITS REQUIREMENTS. I SEE THE ANTITRUST LAWS IN A SIMILAR LIGHT. BECAUSE CONGRESS APPARENTLY DID NOT ANTICIPATE THE APPLICATION OF THE ANTITRUST LAWS TO

CITIES, IT MADE NO EFFORT TO TAILOR THE PROVISIONS OF THE LAWS TO THE UNIQUE ROLE OF CITIES IN THE INTERGOVERNMENTAL SYSTEM. IF THE COURTS HAVE BEEN UNABLE TO DEVELOP A LOGICAL AND CONSISTENT BODY OF LAW UNDER SECTION 1983--WHICH HAS THE UNIVERSALLY SUPPORTED GOAL OF PROTECTING CONSTITUTIONAL RIGHTS AND PROBABLY WAS INTENDED TO APPLY TO ACTIONS WHICH MAY HAVE BEEN SANCTIONED BY STATES OR CITIES--HOW WILL THEY EVER BE ABLE TO DEVELOP A COHERENT BODY OF LAW GOVERNING THE ANTITRUST LIABILITY OF CITIES?

WE ARE ALSO CONCERNED THAT EXPOSURE TO ANTITRUST LIABILITY MAY HAVE AN ADVERSE EFFECT ON THE MUNICIPAL BOND MARKET. REGULATORY REQUIREMENTS ARE FREQUENTLY NECESSARY IN ORDER TO OBTAIN BOND FINANCING FOR PUBLIC PROJECTS. FOR EXAMPLE, IN HYBUD EQUIPMENT CORP. V. CITY OF AKRON, 654 F. 2D 1187 (6TH CIT. 1981), A CITY ORDINANCE MONOPOLIZING GARBAGE COLLECTION AND DISPOSAL (SINCE CHALLENGED UNDER THE ANTITRUST LAWS) WAS NECESSARY TO OBTAIN BOND FINANCING FOR THE CITY'S RECYCLING PLANT. ANTITRUST CHALLENGES TO SUCH REGULATORY REQUIREMENTS OR EVEN THE POSSIBILITY OF SUCH CHALLENGES ARE LIKELY TO RESULT IN BOND COUNSEL ISSUING QUALIFIED OPINIONS ON REVENUE BONDS THAT DISCOURAGE BOND UNDERWRITERS FROM UNDERWRITING BOND ISSUES. AT A TIME WHEN SUCH BONDS ARE FREQUENTLY THE ONLY WAY TO FINANCE IMPORTANT PUBLIC PROJECTS AND INTEREST RATES ARE ALREADY AT AN ALL TIME HIGH LEVEL, ADDING ANOTHER ROADBLOCK TO FINANCING ESSENTIAL PUBLIC ACTIVITIES SEEMS TO BE WHOLLY INCONSISTENT WITH THE PUBLIC INTEREST.

III. CONCLUSION

A. COMPETITION

NLC SUPPORTS COMPETITION IN THOSE AREAS IN WHICH THE MARKETPLACE IS THE MOST EFFICIENT MECHANISM FOR ALLOCATING GOODS AND SERVICES AND THE PUBLIC INTEREST DOES NOT NECESSITATE REGULATION. THE ANTITRUST LAWS ARE CLEARLY NECESSARY TO PREVENT ANTICOMPETITIVE BEHAVIOR IN THE MARKETPLACE. HOWEVER, CITIES

ARE NATURAL MONOPOLIES AND THEIR PRIMARY RESPONSIBILITIES IS TO PROTECT THE HEALTH, SAFETY, AND WELFARE OF THEIR RESIDENTS. IN FULFILLING THEIR GOVERNMENTAL OBLIGATIONS, THEY MUST MAKE MANY DISCRETIONARY DECISIONS THAT MAY GIVE ONE PARTY AN ADVANTAGE AND ANOTHER A DISADVANTAGE. THOSE DECISIONS ARE NECESSARY TO PROTECT THE PUBLIC INTEREST: FOR EXAMPLE, TAXICABS ARE REGULATED TO INSURE THAT THE VEHICLES ARE SAFE, THE DRIVERS MEET CERATIN MINIMUM STANDARDS, AND THE FARES CHARGED ARE REASONABLE AND FAIR. THESE REGULATORY REQUIREMENTS HAVE ALREADY BEEN SUBJECT TO ANTI-TRUST CHALLENGE, THREATENING THE ABILITY OF CITIES TO GOVERN IN THIS IMPORTANT AREA.

B. NLC PROPOSAL

CLEARLY, NEITHER STATE LEGISLATION NOR CASE-BY-CASE LITIGATION IS LIKELY TO PROVIDE A REASONABLE SOLUTION TO THE DILEMMA POSED BY BOULDER. WE BELIEVE THAT THE ONLY REASONABLE ANSWER TO THIS PROBLEM IS TO AMEND THE ANTITRUST LAWS. WE KNOW THAT CONGRESS IS RELUCTANT TO CHANGE THESE LAWS AS THEY ARE CONSIDERED AN ESSENTIAL COMPONENT OF OUR ECONOMIC SYSTEM. IN THIS CASE, HOWEVER, SUCH AN AMENDMENT IS NECESSARY TO PREVENT DISRUPTION OF THE INTER-GOVERNMENTAL SYSTEM AND TO INSURE THAT STATES AND LOCAL GOVERNMENTS, RATHER THAN THE FEDERAL GOVERNMENT, ALLOCATE GOVERNMENTAL AUTHORITY WITHIN THE STATES.

WE RECOMMEND THAT THE ANTITRUST LAWS BE AMENDED TO ESTABLISH A MUNICIPAL ACTION EXEMPTION WHICH PARALLELS THAT OF THE STATES. WE ARE NOT ASKING FOR BLANKET IMMUNITY FOR CITIES, BUT RATHER A LIMITED EXEMPTION THAT WILL ALLOW CITIES TO GOVERN WITHOUT BEING SUBJECT TO INAPPROPRIATE ANTITRUST CHALLENGES. UNDER OUR PROPOSAL, CITIES WOULD HAVE TO COMPLY WITH A THREE PART TEST IN ORDER FOR THEIR ACTIONS TO BE EXEMPT. FIRST, THE CITY MUST ESTABLISH AN AFFIRMATIVE POLICY OF SUBSTITUTING REGULATION OR MONOPOLY PUBLIC SERVICE FOR COMPETITION. IN OTHER WORDS, THE CITY MUST FIND THAT CERTAIN REGULATORY REQUIREMENTS ARE NECESSARY IN A GIVEN AREA IN ORDER TO PROTECT

THE PUBLIC INTEREST. SECOND, THE CITY MUST ACTIVELY SUPERVISE THE POLICY. UNDER THIS REQUIREMENT, THE CITY WOULD NOT SIMPLY ALLOW PRIVATE PARTIES TO FIX RATES OR ALLOCATE MARKETS; IT WOULD BE REQUIRED TO APPROVE AND REVIEW ALL REGULATORY REQUIREMENTS THAT ARE DEVELOPED AS A RESULT OF THE OFFICIAL POLICY IN QUESTION. THIRD, THE CITY MUST ACT WITHIN ITS AUTHORITY UNDER STATE LAW. OUR PROPOSAL IS NOT INTENDED TO IN ANY WAY EXPAND THE AUTHORITY OF LOCAL GOVERNMENTS. OUR POSITION IS SIMPLE: THE STATES SHOULD BE FREE TO ALLOCATE GOVERNMENTAL AUTHORITY AMONG THEIR POLITICAL SUBDIVISIONS ACCORDING TO THEIR DEFINITION OF APPROPRIATE GOVERNMENTAL RESPONSIBILITY.

WE HOPE THAT YOU WILL GIVE THIS PROPOSAL SERIOUS CONSIDERATION. WHILE THERE ARE SOME ADDITIONAL QUESTIONS WHICH NEED RESOLVING (E.G., PENDING CLAIMS AND THE ISSUE OF RETROACTIVITY), RECOGNITION OF THE NEED FOR AN AMENDMENT TO THE ANTITRUST LAWS IS THE ESSENTIAL FIRST STEP IN THE PROCESS. WE DO NOT SEE THIS AS A PROPOSAL WHICH THREATENS THE NATIONAL POLICY OF GUARANTEEING COMPETITION. WE REGARD SUCH AN AMENDMENT AS ESSENTIAL TO INSURE THAT CITIES AND STATES CAN GOVERN AND TO PREVENT AN INADVERTENT FEDERAL PREEMPTION OF FUNDAMENTAL STATE AND LOCAL POWERS.

TOM MOODY
MAYOR
ROBERT C. PARKINSON, P.E.
DIRECTOR OF PUBLIC SERVICE

CITY OF COLUMBUS
OHIO

HENRY A. BELL, P.E.
SUPERINTENDENT

DIVISION OF ELECTRICITY
90 W. BROAD STREET
COLUMBUS, OHIO 43215

June 23, 1982

Tom Moody, Mayor
City Hall
City of Columbus

Dear Mayor Moody:

I understand that you will be testifying June 30, 1982 on behalf of the National League of Cities before the Senate Judiciary Committee on the subject of application of the antitrust laws to units of local government.

The American Public Power Association, on whose board I serve, has a keen interest in this subject, and has endorsed immunization of cities from Federal antitrust laws. At its most recent annual conference held May 24-26, 1982 in New Orleans, Association members approved the enclosed resolution which called on the Congress "to remove this impediment to the free exercise of legitimate municipal functions by amending the Federal antitrust statutes to exclude from their coverage actions by municipalities."

APPA represents more than 1,750 municipally-owned electric utilities and other public power systems. If NLC holds a position similar to APPA, you might want to mention APPA's stand in your comments to the committee and to offer APPA's resolution for the hearing record.

Please let me know if you need additional details about APPA's stand on this matter.

Very truly yours,

Henry A. Bell

Henry A. Bell, P.E.
Superintendent

HAB/rr

Enclosure

RESOLUTION
ON
MUNICIPAL ANTITRUST LIABILITY

WHEREAS, in 1978, the U.S. Supreme Court, in City of Lafayette, Louisiana v. Louisiana Power and Light Company, ruled that actions of municipalities were subject to review under the Federal antitrust laws unless the State had specifically authorized the municipalities to engage in such actions, thereby extending to the municipalities the State action exemption from the Federal antitrust laws, and

WHEREAS, in 1982, the U.S. Supreme Court expanded the potential antitrust liability of municipalities by holding, in Community Communications Company v. City of Boulder, Colorado, municipal ordinances including those adopted by "home rule" municipalities could be challenged on Federal antitrust grounds, and

WHEREAS, these two cases have resulted in an explosion of litigation against municipalities on antitrust grounds, creating a chilling effect on the exercise of legitimate municipal operations, due in part to fear over expenses involved in defending an antitrust suit, whether or not meritorious, and in part to the fact that treble damages under the Federal statutes must be awarded when antitrust liability is established, and

WHEREAS, municipalities, like states, must exercise certain regulatory responsibilities, in some cases electing, in the public interest, to displace competition with regulation, and

WHEREAS, promotion of competition and preservation of the principles underlying the Federal antitrust statutes are elements which must be evaluated in determining whether proposed municipal ordinances or actions are in the public interest, but public interest decisions must not be based solely on antitrust considerations, a result which would seem to be required under the recent Supreme Court decisions,

and

WHEREAS, the electoral process, traditional controls exerted over public officials, and other legal remedies present sufficient opportunities to challenge municipal actions, making unnecessary the application of Federal antitrust statutes or municipal actions, and

WHEREAS, the justification for the state action exemption from Federal antitrust liability would seem to apply equally to actions of municipalities, and

WHEREAS, the Supreme Court has recognized that States may extend to municipalities their antitrust immunity; however, the Court has also indicated that a general grant of such immunity would not be adequate, and

WHEREAS, specific grants of immunity by States to municipalities to permit them to engage in certain activities without fear of challenges on antitrust grounds would require considerable State legislation due to the diversity of municipal operations, and even such specific grants might not be found adequate due to the need for local governments to act based on changing circumstances and conditions;

NOW, THEREFORE, BE IT RESOLVED: that the American Public Power Association urges the Congress to remove this impediment to the free exercise of legitimate municipal functions by amending the Federal antitrust statutes to exclude from their coverage actions by municipalities.

-- Adopted May 25 by members of the American Public Power Association at the 1982 Annual Conference held in New Orleans, Louisiana.

The CHAIRMAN. We will be glad to hear now from Mayor Hayes, of San Jose, Calif. Mayor Hayes, would you like your entire statement to be inserted in the record, and you may then make such comments as you care to?

Ms. HAYES. Yes, Senator, I would.

The CHAIRMAN. Without objection, that will be done following your oral remarks. You may proceed.

Now, I believe we are going to give you all 5 minutes apiece, so if you could stay within the 5 minutes. Otherwise, we will not get to hear some witnesses at all.

Ms. HAYES. All right. Thank you very much. Many of my comments in the written record have already been made by the distinguished speakers.

I would only like to begin by saying that already, we are experiencing government by initiative. We are now seeing in this, I believe, government by court edict. We feel our responsibilities very much as public officials to protect the public from abuses, and I do believe that those protections already exist. They are not 100 percent perfect, but they are very, very good.

This particular situation is not going to help. It is extremely controversial. It is a very close court decision, as you know, and the challenges will be unending. We believe, as local officials, that we are the closest to the people. We are held most accountable and scrutinized the most by our own constituents and the news media, we believe, and that is as it should be. These are legitimate municipal functions.

The point that I would like to make, and has already been made, is that this Supreme Court decision has created absolutely vast problems for us at the local level. It makes all of our city contracts with private businesses, such as our garbage contracts, our cable television, even the hot dog vendors, the taxicabs and limousines, our airport, our water companies, our paramedics, subject to antitrust lawsuits in the Federal courts.

Senator METZENBAUM. Mayor, would you elaborate on that, please? If you award those contracts competitively, then how would you be subject to antitrust liability? Isn't it only when you fail to use competitive procedures that you become subject to antitrust liability?

Ms. HAYES. It is my understanding that there are already suits existing in the courts. You mentioned since the Lafayette was mentioned, there have been over 30 suits. In this particular case, there have been suits that we know of in Dallas, Akron and Richmond, by contractors who lost out. We feel that we are under the uncertainty that exists by this decision, that there will be the possibility of endless litigation, which for us would be extremely expensive and time consuming.

Senator METZENBAUM. But you have not quite answered my question, if I may say so, and maybe others are in a better position to answer it. If you award the hotdog contract, or whatever contract—garbage collection contract—on the basis of competitive bid, do your lawyers tell you that you would then be subject to antitrust liability? It seems to me that the problem that arose in the *Boulder* case was that one bidder was selected, or one was selected out of several, for the cable TV franchise. Now, frankly, to me,

antitrust only means one thing, and that is, it means competitive forces able to work in the free enterprise system. And I recognize the special problems of the cities. I think that we need to find some solutions. But I do not think that we ought to approach this problem without keeping our feet on the ground. Certainly, you cannot have 12 garbage collection companies operating in the same city, but if it is awarded on a free and competitive bid basis, then I am questioning whether or not these lawsuits that have already been filed were filed in spite of the fact that there was competition and free competitive forces worked, and that they were not the low bidder. That would hardly seem to me to provide a basis for an antitrust action. It seems to me that that is one of the basic questions that I, at least, would like to understand from this.

Ms. HAYES. I think you go to the heart of the problem, and actually, in Boulder, the Supreme Court decision had to do with a 3-month moratorium that the city imposed, and they had passed two local ordinances that seemed to them to be procompetitive. Actually, the case involved a situation in which the existing cable television company wanted to expand their activities and their operations during a time in which the city of Boulder was wanting to consider other competitive bids. And that is why it seems to us at the local level that this is such an unclear, confusing situation for us. We do have a panel of lawyers that are going to speak next, but it seems to us that the Boulder situation, with those two ordinances that they passed, was actually procompetitive.

So I will let the lawyers speak more to your question, because I think that is a very important point for us all to understand why the cities are joining across the country in opposition to this. The effects are just being realized and felt, and we are extremely concerned about the liability which has been mentioned. We are concerned about the fact that the bond-rating agencies, for example, are very, very interested in what is happening in this case and in what is happening with the congressional purview of this. We can see adverse effects in our bond rating that can literally cost us millions of dollars. In addition to the expensive and time-consuming litigation that we face, we just simply cannot afford this. As Winston Churchill has so aptly said, and I believe it applies in this case, the meaning of the *Boulder* decision is "a mystery within a riddle, wrapped in an enigma." We feel that it will absolutely critically cripple the implementation of our public policy. We are in charge of public health, welfare, and safety, and this will not help us at all in this. Again, it opens up our city to more lawsuits, and I have called this the "Attorneys' Economic Opportunity Act of 1982." The lawyers at this time are absolutely standing around the blocks at the cities, in suing the cities, and we have more suitors—I have never had more suitors in my life than I have had as the mayor of San Jose. We are just constantly sued, and that is part of the deep pocket theory.

The paralysis that we face is just simply unacceptable, particularly at a time when we are in the era of fiscal constraints, as you are, too, here in Congress. We have introduced a resolution that was unanimously passed just last week by the U.S. Conference of Mayors in Minneapolis, which indicates the real alarm that mayors feel in this. We feel that there exist local protections already in the

vast array of Federal and State laws that protect our people. We are under the anticorruption and conflict of interest laws. There is just no question——

The CHAIRMAN. Excuse me just a minute. Now, we are putting your entire statement in the record, and there is no use to repeat here an entire statement. And we gave each of you just 5 minutes to make comments, and we will have to confine it to that; otherwise, we will not get to hear these city attorneys.

Ms. HAYES. And I want you to hear them.

The CHAIRMAN. I think your time is about out, if you can finish in 1 minute.

Ms. HAYES. All right. I would just like to summarize by saying that we plead with the congressional committee to help us in this situation. We think that there is a great deal of unfairness as well as uncertainty, and we are here imploring you on behalf of the cities across the Nation to pass the necessary legislation to get us out of this terrible situation.

The CHAIRMAN. Thank you. We are glad to have you.

[The prepared statement of Mayor Janet Gray Hayes follows:]

TESTIMONY OF

THE HONORABLE JANET GRAY HAYES
MAYOR OF SAN JOSE, CALIFORNIA

on behalf of

THE UNITED STATES CONFERENCE OF MAYORS

Good morning, Mr. Chairman, and members of the Senate Judiciary Committee. Thank you for this opportunity to speak to you about a matter of great importance to cities and other local governments throughout the United States. The effects of the Boulder decision are just now surfacing for cities, and I am not at all certain that cities are prepared to meet the uncertainties and problems created by the Supreme Court's decision.

Although the Boulder case presents cities with many problems, there was also much that was not decided by the Court. For example, the Court reserved important questions such as the need for "active supervision" of local activities by the state; the extent to which actions by cities will be treated differently under the antitrust laws than actions by private parties; and whether treble damages will be available against cities.

Even if, finally, all of these reservations are resolved favorably for cities, the uncertainties they create now, and the expense of litigating them will cause serious distortions in the implementation of public policy, and will make considerable inroads into public treasuries.

Thus, it is largely the uncertainty that the Boulder decision has created that is the evil that needs correction. It may very well be that the courts will finally devise rules on all of these questions which will be workable and understandable, but in the interim, cities, Mayors, and city attorneys, will be required to question every action they take for fear of potential liability under the federal

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antitrust laws. As I will try to demonstrate in this testimony, it is doubtful that anyone can come up with a workable statement of what Boulder means for cities. To paraphrase Winston Churchill, the meaning of the Boulder decision is a mystery within a riddle wrapped in an enigma.

The foremost impact of the Boulder decision is that it is, today, crippling the implementation of public policy at the local level. The city of Boulder argued that the purpose of its 90 day moratorium was to give the elected officials of the city time to review the allocation of cable television rights over the public right of way. The ordinance was designed to be pro-competitive. As a result of the antitrust litigation, the citizens of Boulder have been deprived of access to cable television systems. Another good example is Fairfax County, Virginia, which, on the day Boulder was decided, was ready to award a cable television franchise. Because of Boulder, the county had to go to the governor of Virginia (it was so late in the legislative session that only the governor could introduce new legislation) to ask him to propose new legislation. While the Virginia legislature acted on Fairfax County's request, it is still unclear whether the act is a sufficient statement of state policy to insulate the county from review under the federal antitrust laws. Thus, understandably, the county has been reticent about acting on the proposals before it.

This paralysis is unacceptable, particularly since most things that cities and other local governments do affect some private sector activity. Under the Boulder decision virtually every decision by local government will be subject to review by the courts, courts that will have to make interpretations under the "quicksand" reasoning of the Boulder case.

The second, immediate, impact of the Boulder decision will be on city budgets. As city councils and Mayors act

only with the advice of the city attorney, it is likely that the city attorney will be named as a defendant in any litigation. Thus, the city will have to retain outside counsel, at considerable expense, to represent it. And, if the city loses, it will be obligated to pay attorneys' fees to the plaintiffs. If the cities really should be responsible to private parties under the antitrust laws, payment of attorneys' fees may well be acceptable. The problem, of course, is the drain on public treasuries that will surely ensure, especially in the interim litigation that will be required to ferret out the meaning of the Boulder decision.

The Mayors of the United States are concerned about the Boulder decision. Just last week the U.S. Conference of Mayors held its annual meeting in Minneapolis/Saint Paul, and the Mayors unanimously adopted a resolution calling for the clarification of the Supreme Court's decision in Boulder so as to reduce the uncertainty that the decision creates. I have attached a copy of the Conference of Mayors resolution to my testimony, and would ask that it be included in the record.

There are two items that must be brought to your attention in your consideration on this issue. The first is that a very practical argument can be made that the federal antitrust laws, while creating significant problems for cities, do not really offer much additional protection to parties aggrieved by the actions of a city. The second is that, under the language in Boulder, the states, even those seeking to provide the best of protections to their cities, will be unable to write legislation which will adequately address the needs of their local governments.

Local governments are subject to a vast array of federal and state laws that prevent them from abusing the rights of people or of businesses in their activities. A short listing of those laws would include federal protections of

due process and equal protection; this, of course, includes actions under section 1983 of the Civil Rights Acts, and both federal and state requirements concerning open meetings, freedom of information, public disclosure of the financial interests of public officials, anti-corruption, and conflict of interest laws. The addition of the federal antitrust laws to this panoply of protections adds very little. However, it does cause considerable uncertainty for cities and their officials as they attempt, in good faith, to go about the public's business. City officials that actually seek to abuse their power to affect adversely the rights of others are now, under current laws which are actively enforced, not going to get away with it. The antitrust laws will add only slightly to the protections against abuse that are afforded under current law. Still, they will cause incalculable problems for city officials attempting to implement the public will that they thought their election to office signified.

Secondly, Mr. Chairman, I wanted to discuss the simple inability of the states to address the needs of local governments in the wake of Boulder. The states, or anyone else for that matter, cannot know what to do to meet the dictates of Boulder other than passing legislation that mandates a certain activity by a city and that also expresses the state's policy to displace competition in a way that is "clearly articulated and affirmatively expressed" and that provides some means by which the state will actively supervise the performance of the city.

Even then, there are big problems. For example, the ruling in Boulder will be retroactive. Thus cities will be subject to suit for actions undertaken as early as 1977. In addition, there is another retroactivity, one that has been called "almost sinister," by one commentator. Cities that have been operating under state enabling legislation could

not have foreseen or "contemplated" this decision by the Supreme Court. If cities are immune from antitrust attack only where they are operating under state law which "contemplated" the anticompetitive activity complained of, they will have little or no defense, because the state legislatures could not have known what rules would be devised by the Supreme Court of the United States.

Another set of significant problems with the states' provision of immunity to local entities in their activities has to do with timing. Many state legislatures meet only biennially, and will not be in session to provide guidance to their local governments. In addition, it is questionable whether the legislatures of the various states can devote the time or attention to Boulder issues for each jurisdiction in the state.

Most importantly, Mr. Chairman, it is clear that there will be substantial lobbying in state legislatures over antitrust protections. Existing taxicab companies will be urging the legislature to adopt legislation authorizing the status quo while incipient companies will be opposing any legislation or will seek legislation that promotes their entry into the market. The city will be seeking some guidance and a sufficient direction to insulate it from suits demanding injunctions, treble damages, and attorneys' fees.

It should be a matter of some concern to this Committee that the essential issues of the coverage of the federal antitrust laws are now going to be subject to the legislative process of each of the 50 states. None of the problems I have just outlined presume that the state legislature will find immunity from the antitrust laws for their sub-state jurisdictions to be anathema. But, even if they knew what the magic words were, the states would face significant impediments in attempting to reauthorize their local governments to do the things they were designed to do, such as

the regulation of local activities to promote the public health and welfare.

Thus, there are many problems that the Boulder decision creates for cities. The situation today cries out for a federal legislative solution. Only the Congress, by detailing the nature of state and local relationships within the framework of the antitrust laws, can provide a ready and workable solution to these dilemmas.

Even if they want to, it will be very difficult for the states to provide adequate protections to their sub-state entities. The litigation that will be required to clarify the uncertainties generated by the Boulder decision will consume very considerable governmental resources in executive time and public dollars that could be better spent elsewhere.

Finally, Mr. Chairman, it is disconcerting to see that one chapter of the United States Code, the antitrust chapter, which in my opinion was never designed to regulate local governmental activities, will become the common fulcrum on which state and local governments will allocate power and responsibilities among themselves. The result of the Boulder decision is at variance with every version of federalism I have studied, from the old federalism to the President's New Federalism. In addition, that result may well crimp many of the public-private initiatives that local governments and commercial enterprises have been pursuing in this time of fiscal restraint.

The resolution of the Conference of Mayors calls on this Congress to provide cities with the same protections as those enjoyed by the states so long as the city is operating within its authority under state law. It is a modest proposal which, other than changing the Boulder result, leaves the state action doctrine intact. That proposal

really serves all interests, federal, state, and local, and it seeks to return a sense of balance to the intergovernmental system. I would urge this Committee to consider the U.S. Conference of Mayors resolution very carefully, and to seek to work with Mayors to find a solution to the problems I have outlined today.

Municipal Antitrust
Liability

WHEREAS, the United States Supreme Court has held, most recently in Community Communications Co. v City of Boulder, Colorado, that cities and other sub-state entities are subject to review under the federal antitrust laws; and

WHEREAS, that review can reach all activities of cities regardless of the governmental or proprietary nature of the activity; and

WHEREAS, cities under the Boulder ruling, including full, homerule cities, can only be insulated from antitrust scrutiny if they are operating under state authorizing legislation which sets forth the state's policy to displace competition in language that is "clearly articulated and affirmatively expressed," and which provides for "active supervision" by the state; and

WHEREAS, antitrust litigation is enormously expensive and time consuming and can result in significant delays in the implementation of public policy, and, in the event liability is found, the actual damages are automatically trebled by the operation of law; and

WHEREAS, very significant protections already exist for all parties doing business with or otherwise dealing with cities in the form of due process, equal protection, and civil rights reviews, and with state open meeting, administrative procedure, and procurement requirements among others,

NOW, THEREFORE, BE IT RESOLVED that the U.S. Conference of Mayors calls upon the Congress to adopt legislation to clarify the applicability of the federal antitrust laws to cities, and to provide cities and other municipal entities with the same status as that enjoyed by the states so long as the city is operating within or pursuant to its general enabling legislation or authority.

The CHAIRMAN. Mr. Hugh Allen, Jr., the mayor of Demopolis. Mr. Allen, would you like your statement to go in the record, and then you may make comments not to exceed 5 minutes?

Mr. ALLEN. Yes, I would.

The CHAIRMAN. Without objection, it will go in the record following your oral remarks. Please proceed.

Mr. ALLEN. I think the main thing that I can represent is small cities within the United States, and to put it very briefly, we are on limited budgets, as everyone is. In my own instance, we have a part-time city attorney who attends two council meetings a month and then is available to us when we need him.

We do have approximately nine other practicing attorneys in town, none of which are familiar with antitrust legislation or litigation. It is going to be hard for us to find someone to represent us, should we need it, and we do not have the money to expend. I think all cities are looking at a situation where we really do not know what to do. We are going to have to go to larger towns and hire expensive law firms to try to represent us and we do not have funds to expend for this additional representation. We would hope that somehow, you could figure out a way to simplify it, so we know what we are doing, and we can take it from there.

I also would like to note that the Attorney General has a statement in my statement, and he says that he does not feel that his office can handle it for the State of Alabama, and that it needs to be handled as a nationwide problem and should be handled by the Congress.

I will end my comments there.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mayor Hugh Allen, Jr., follows:]

PRESENTATION TO THE SENATE JUDICIARY COMMITTEE ON JUNE 30, 1982, BY MAYOR HUGH ALLEN, JR., MAYOR OF DEMOPOLIS, ALABAMA

Mr. Chairman and Members of the Committee:

I certainly appreciate the opportunity to participate in this discussion. My name is Hugh Allen, and I am the mayor of Demopolis, Alabama. Demopolis is almost due west of our Capitol City of Montgomery by 100 miles and is a few miles from the Mississippi border. Our population is slightly more than 7500 and we have a government composed of a mayor and five councilmembers. As mayor, I preside over the council meetings and have a vote on every issue that comes before the council.

Demopolis lies at the junction of the Black Warrior and the Tombigbee rivers and forms what we call Lake Demopolis which is backed up by the Demopolis Lock and Dam. The stream is navigable and there is considerable traffic on these two river systems. There will be a tremendous increase in traffic upon the completion of the Tennessee-Tombigbee Water Project.

Demopolis is the largest city in Marengo County, but surprisingly enough, it is not the county seat. Our economy is based on agriculture--principally soybean, cotton, cattle, timber and pulpwood.

Demopolis is somewhat unique in Alabama in that it was organized and settled originally by the French. It was anticipated that they would grow olives for a cash crop and grapes to make wine. Unfortunately, the climate was not conducive to the growth of either of these plants. We have some lovely antebellum homes located in the city and surrounding area including Gaineswood, which is operated the State of Alabama, and is one of the premier examples of Greek revival architecture still standing in the South.

As you can see from my remarks, Demopolis is a typical small southern municipality. Insofar as services are concerned, we provide police and fire protection, water and sewer service, garbage collection service, and maintain streets within the city. We have two banks and 10 practicing attorneys at the present time. This is the largest number of attorneys that I can remember us having in my lifetime. I doubt that any of them, with the possible exception of the city attorney, has ever heard of the Boulder decision. I am sure that none of them, including the city attorney,

would know how to prepare and litigate an antitrust suit. We would be forced to go to the larger cities looking for legal counsel to represent us in any antitrust litigation we might become involved in. This would cause us to be subjected to legal expenses far beyond the financial capabilities of our small municipality.

By national standards addressing cities in our population bracket, Demopolis offers a full range of services to its citizens. However cities of all sizes in our state have permissive authority to engage in providing electric service, gas service, cable television service, ambulance service, and mass transit service in addition to police, fire, water, sewer and garbage collection services. In fact, Alabama municipalities have the legislative authority to operate most any kind of system which you can imagine. We have the option of running such services through a city department or by way of a contract with private enterprise. If our city does not wish to engage in providing a particular service, we have the authority to grant private concerns a franchise to run such a service. We have seen fit to grant such a franchise to a private concern to run our local cable television system. In the operation of any of these services or by the granting of any contracts or franchises, it is my understanding that we could violate the antitrust laws. I further understand that zoning decisions, licensing or any activity which restricts or regulates private enterprise could involve the antitrust laws. Without some changes in the antitrust laws, we will be forced in many instances to delay needed projects and decisions while we examine their antitrust consequences. The delays as well as the cost of obtaining such legal advice will place an unneeded strain on our budget.

Gentlemen, I don't know too much about the law as I am a full-time mayor of a small town. However, I am of the opinion that our State Legislature is not the body to solve our problems with the antitrust laws. I have served on both the Executive and Legislative committees of the Alabama League of Municipalities, and as such have been active in the promotion of legislation favorable to our municipalities. Our legislators are part-time and they are not, at the present, provided with office and staff. This hampers their ability to dig deeply into any subject. It has been

traditional in Alabama for many interim committees to be appointed to study specific problems during a time when the Legislature is not in session. As far as I know, there has not been any such committee appointed to study the antitrust situation. Further, much legislation affecting cities and towns in Alabama is permissive in nature because of the wide population differences between our larger cities and our smaller ones. Some municipalities opt to use the authority while others do not. As I understand it, if the State attempts to pass legislation to insulate cities from antitrust claims, such legislation must be mandatory in nature, and therefore, it would lose much of its effectiveness because of the diversity in size and capacities of our cities.

I am please to announce that I am authorized to read a statement into the record I brought along with me from Charles Graddick, Attorney General of the State of Alabama. The statement reads as follows:

"With the multitude of problems facing our municipalities, particularly in these times when Federal assistance is being drastically reduced and city services of necessity are being curtailed, it is distressing to have municipalities saddled with the problems of antitrust litigation. Unless the problem is corrected, it is my judgment that my office would have to create a division to assist local attorneys in antitrust litigation. I, as Attorney General, would be hard pressed to spare staff personnel to assist local counsel for two reasons. First, without detracting from the abilities of our lawyers, I have to say that very few of them have had any experience, to date, in prosecuting or defending antitrust cases. Second, hiring expert attorneys in this field would cause a strain on our budget. I further believe that state legislation would be too restrictive to be of a great deal of help and I think that relief must be given at the national level."

In closing, I wish that I were able to address the specific problem or make a specific recommendation to you gentlemen. I would like to leave on the basis that it is my considered opinion that legislation at the national level, in this instance, would be helpful and is necessary.

The CHAIRMAN. I have just a few questions, and then I will turn to the other Senators who are here.

Ms. Hayes, Professor Baxter mentioned in his testimony as a possible legislative solution, clarification of the degree of specificity with which a State must authorize local government activity. Would you favor such an approach?

Ms. HAYES. No, sir, I would not, because as you well know, many of the States do not meet in constant session as they do in the State of California--well, almost constant--some State legislatures meet every other year. You would have 50 different situations, and I think this is where congressional action is definitely called for. It muddies the waters in our State/local relationships.

The CHAIRMAN. Another question. I know that you are greatly concerned with the prospect of having to pay treble damages from the public Treasury. Would you support any proposal that limited recovery to single damages?

Ms. HAYES. Well, that would certainly be better than treble damages, but I think that the reasons we have given here are why we need congressional action on this very bad decision.

The CHAIRMAN. Thank you.

Mr. Moody, I have a question for you. On page 5 of your testimony, you make reference to the fact that before 1975, courts routinely dismissed antitrust actions against both State and local governmental entities. Could you supply the committee with some specific cases involving cities we could study on that point?

Mr. MOODY. Yes, I will. It would be more appropriate if I would do that at a later time, sir. Is that satisfactory?

The CHAIRMAN. Well, as soon as you can.

Mr. MOODY. Yes, within a couple of days or so. I am not able to recite them now is my point.

The CHAIRMAN. That is all right, within a reasonable time.

Now, also, Mr. Moody, on page 7 of your testimony, you cite the *Professional Engineers* case with the proposition that "courts may be precluded from considering the impact of municipal actions on public health, safety, and welfare." It seems to me that the *Professional Engineers* case can be distinguished, because private rather than Government conduct was involved. Would you agree with that analysis?

Mr. MOODY. I would, but there are other cases also supporting, and perhaps in this paper, we have not chosen the best one to illustrate the point. The problem is that under the rule of reason, the courts are not going to consider public health, safety, and welfare, and public health, safety, and welfare is the be-all and end-all of municipal government, however wisely or unwisely we respond to it. But we cannot even use that in these cases, because it is a question of whether it fosters competition or inhibits competition and the public policy reasons having to do with health, safety, and welfare are not legitimate arguments for us. Our complaint is that we are deprived of that. I would agree that that is not the best case because it is distinguishable in the public/private aspect.

The CHAIRMAN. Mayor Allen, some antitrust authorities have suggested that the *Boulder* case did not necessarily hold that local governments must meet the active State supervision requirement of *Midcal*, arguing that such a requirement was meant to apply

only to private parties seeking State action immunity. If that analysis was correct, would this eliminate at least some of your serious concerns?

Mr. ALLEN. I do not think so, I really do not.

The CHAIRMAN. All right, thank you.

Senator Metzenbaum.

Senator METZENBAUM. Mayor Moody, I am happy to welcome you here this morning, and I found your statement interesting and thought provoking, and the statements of the mayors of San Jose and Demopolis, as well. Let me just share with you some of my concerns about this legislation. First of all, I think that there is a heavy burden of proof on any group or organization when they come in for an exemption from the antitrust laws, but I am prepared to recognize that there is a distinction, and probably a justifiable one, with respect to the cities. The question is how far you carry that distinction.

Now, the fact is that probably the reason a city got into the *Boulder* case was something similar to what used to happen many years ago, because I would guess that of all of the franchises that cities have granted with respect to which they played lots of political games, including monetary games, including having members of the Council and members of the administration being part of the cable TV franchise—I do not think there is any area where I have seen that which has a worse odor than the award of cable television franchises. I know nothing at all about your three cities, nor need my comments elicit a response. But the fact is that cities have been in a position to say, "This one, we like, and that one, we do not like," not having anything to do with the welfare of the city, but quite often having to do with the welfare of the local politicians. I remember in my own community that in every day's paper, I would read—where we had many suburban areas—about how this politician and that politician owned a piece of the franchise until he was bought out after the franchise was purchased.

So I would just say that the cities do not come in with totally clean hands on this subject. But having said that, I also am aware of the fact that municipalities are not in a position to spend substantial sums of dollars defending themselves against antitrust cases which may be filed on a willy-nilly basis. And I think it therefore becomes important for this committee in considering this problem not just to say, "Oh, we have such problems, you have to leave us alone and trust us." I have never found any group that came before Congress asking for an exemption from antitrust legislation that did not say, "trust us," but I have never found that those who protest the loudest about asking to be trusted are necessarily the ones in whom our greatest trust should be placed.

So I think the question that is before this committee, and maybe that is even more before the municipal officials, for bringing this issue before the Congress and who are realists enough to know that legislation will not pass unless there is a pretty general consensus that it should pass—in other words, if there is opposition as we move toward the close of the congressional session, it makes it all that much more difficult to enact legislation of this kind—I think there is a responsibility, therefore, to attempt to sit down with those of us in the Congress who do have strong views about anti-

trust exemptions to see whether or not we can work out some legislative approach that the cities can live with and that we in the Congress who do not look favorably upon antitrust exemptions can live with as well. I would say that this Senator, for one, is prepared to work in that direction with whomever the cities may designate. Having said that, let me ask you this question—and my staff points out to me that there is no particular bill before the Congress at the moment, only a discussion of the problem, in which case my comments may be all the more relevant, although I am frank to tell you that when I made the comment I was not aware of that fact.

You talk about the cities having to comply with a three-part test in order for their actions to be exempt, and then you spell those out, and I will not repeat them here. Give me a practical example of how that would work, for example, in connection with the award of a cable television franchise—or a garbage collection franchise, whatever.

Mr. MOODY. Senator, I am not thinking in terms of cable television at the moment, so——

Senator METZENBAUM. How about garbage collection or hotdog stands?

Mr. MOODY. All right. The application of—first, there would have to be a hearing and maybe a series of hearings, to establish an affirmative policy on behalf of the city, and that policy would be one of substituting regulation or a monopoly public service, depending upon the circumstances.

Senator METZENBAUM. First of all, we know what monopoly public service is. That would mean the city would run the cable television or do the garbage collection itself, so that does not create any problem. The question is how do you have the substitution of regulation in this respect that would meet the necessary standards, because it is sort of assumed that you have some regulatory procedures as to how you do award contracts now. So what are you saying in that respect?

Mr. MOODY. Well, for instance, the taxicab business comes to mind as one I can talk about more easily than others. We do not have an unregulated situation. We regulate a number of things in the taxicab industry. We regulate the number of taxicabs that are allowed in the city. We regulate who may drive these taxicabs. We regulate the rates. And we regulate certain practices about solicitation, where they may queue up, and things of that sort. This is still a free enterprise system, and these are independent owners.

Senator METZENBAUM. Then, can anybody come in and get a license to drive a taxi in your city?

Mr. MOODY. We have tried to open that up, and the answer is yes, but it still does not work. There have been——

Senator METZENBAUM. So the answer is yes, but realistically, no?

Mr. MOODY. Well, the difficulty is that the costs of insurance—which is another one of our regulations—prohibits many people from owning these—not only the cost, but obtaining the insurance.

Senator METZENBAUM. Well, in Cleveland, they have had a monopoly taxicab system there for so many years going backward that I can hardly remember, and it has actually provided terrible service to the city. There ought not be a monopoly there, but they have been politically well enough connected that they have been able to

maintain a monopoly, and no competition can come in. In New York City, we are aware of the fact that if you want a hack driver's license, I think the fee used to be something in the area of $25,000, and now it is something in the area of $50,000. The real question that I have is, shouldn't there be, under these circumstances—for those of us who believe that competition ought to have an opportune chance to work, or a man or a woman ought to have a chance to drive a cab and to be in competition—isn't there some merit, or isn't there some responsibility on the cities to provide an adequate answer, and is it proper that one company in my own community of Cleveland has had the franchise for maybe 30, 40 years; competition has attempted to come in, but couldn't get in. In New York, we know the situation, that you have to buy a hack driver's license–I do not know why. Why can't somebody just get a cab, buy the insurance, and meet certain requirements, have certain character references. But I think that there are some tough questions in that area.

Mr. MOODY. Well, Senator, I totally agree with what you are saying, but the city of Columbus has given up the exclusive franchise proposition, and it really was not exclusive. We had about three, one large one and two very small ones, and now that has been given up. We have a new licensing procedure, and the licenses have been expanded, but there has been no great parade for anybody to come in and get them. We have even given up the exclusives at city-owned property such as the airport, and in our case, just the reverse has occurred. While it was under a monopoly situation by contract, our cab service was very much better than it is today, and we had fewer problems, and they were more easily solved.

And you will have to forgive me, Senator, but appears that there are many situations in which the same system can work well, or badly, and I think it has to do with the character of the participants rather than the nature of the system, and of course, Cleveland is not quite so good as Columbus in that regard.

The CHAIRMAN. We do not have a bill before us right now. We can later go into the details of the legislation, Senator, but we would like to hear these witnesses while they are here, and if you have any questions while they are here, well, proceed, but otherwise, I think we can wait until we get legislation to go into detail.

Senator METZENBAUM. No problem with me, Mr. Chairman.

The CHAIRMAN. Now, I noticed that the city attorneys have very heavy briefs here that cost thousands of dollars to print, so without objection, I am going to hold that all the statements will be placed in the files of the committee, and give you a chance, if you can submit summaries of about five pages—would that be agreeable to you mayors and city attorneys?

Mr. MOODY. Yes.

The CHAIRMAN. Later, we will have legislation, but right now, these statements that we have had are very long, and I do not see the use of putting the Government to the expense of putting all of these statements in the record. We will have them available in the files of the committee.

Would you care to submit to us a summary of your positions, Messrs. Mayor and Madam Mayor, if you could submit about a

five-page summary to us that we can put in the record, and not put the entire statements in, but we will hold them in the files. That will save the government thousands of dollars in printing.

Without objection, Senator Dole wishes his statement be placed in the record.[1]

If people know what they want to say, they ought to say it in a brief period. Now, when you submit four or five pages, the Senators will read that. They are not going to read 40 or 50 pages from each one of you or even 20 pages hardly. So I just want to say that if you can be brief and come to the point and give us your position, that is what we want to hear. We are not after getting a whole lot of stuff here to read; we do not have time to read it.

I want to thank all you mayors for coming here. I think your testimony has been helpful. I can certainly sympathize with you on this problem, and I hope something can be done to give you some relief. Thank you for your presence.

Ms. HAYES. Senator, if I could just end by saying that this is at a time when at the local level, we are looking toward public/private partnerships more than ever before, in order to deal with the lack of revenue that we are facing. So I would hope it can be cleared up and that we can go ahead in these partnerships.

The CHAIRMAN. Well, I hope that we can get through some legislation that will be reasonable and will be of assistance. I want to ask you this, now. I believe you mentioned something about the State and the local communities. I wonder if it would not be well if the State Attorneys General's Association or the Governors' Association, or both, and the Mayors' Association, the League of Cities, and the county organizations—there are about five or six of those organizations—could get together and see if you can agree on a bill. Now, if you do not, then you are going to have the State coming in here, taking one position, the counties taking another, the cities taking another, and you are going to have a dog fight, and you may not get through anything. I am very frank now, to talk to you this way. But if you get your Governors' Association and your Attorneys General's Association and the municipal associations and county associations to meet and see if you all can agree—if you cannot agree, then if you could point out your differences, we will have to resolve. But if you can agree on some legislation, it would come a whole lot nearer passing than if a piece of legislation is introduced, and the Governors are for it and you are against it, or they are against it and you are for it. Do you catch what I mean?

Ms. HAYES. Yes.

Senator METZENBAUM. Mr. Chairman, if it would not be an impertinence, I would suggest that they might even discuss the matter with some of us who are in the Congress.

The CHAIRMAN. I think that would be helpful. Senator Metzenbaum has given a lot of attention to antitrust matters. He and I do not always agree, but he has a very keen insight into these matters, and he would be worth listening to. And there are others in the Senate and House of Representatives who have, too. I think it would be well if you would confer with them. But, I do think if you are going to get results, if you are going to get action, that you would come a whole lot nearer getting it if you can consolidate

[1] Can be found on page 153.

your views into legislation that will not be bitterly opposed by all these different organizations. Does that make sense?

Thank you very much.

Now, we will excuse you and ask the city attorneys to come up.

Mr. MOODY. Thank you, Mr. Chairman.

The CHAIRMAN. We have Robert J. Logan, city attorney, San Jose, Calif.; John W. Witt, city attorney, San Diego, Calif.; William H. Hefty, city attorney, Richmond, Va.; and Mr. Gregory S. Lashutka, city attorney, Columbus, Ohio.

We are very pleased to have all of you here. Without objection, we are going to place your statements in the files of the committee, and if you will give us a brief—say, not to exceed five pages—then we will put that in the record. You heard what I said to these other people. I do not see at this point where it is incumbent upon the Government to spend thousands of dollars which it will cost to put all of these thick briefs in the record now. Later, we will have some legislation on this subject anyway, I presume.

Is that agreeable to you to submit to us briefs of about five pages, and we will hold your statements, and they will be available to the Senators, available to any committee here, and to the staff, the full statements that you make.

Now, do you have a statement that you would like to make, starting over here, not to exceed 5 minutes?

Senator Metzenbaum is going to preside for a moment.

[Whereupon, Senator Metzenbaum assumed the Chair.]

Senator METZENBAUM. Please proceed.

STATEMENT OF A PANEL, INCLUDING: ROBERT J. LOGAN, CITY ATTORNEY, SAN JOSE, CALIF.; JOHN W. WITT, CITY ATTORNEY, SAN DIEGO, CALIF.; WILLIAM H. HEFTY, CITY ATTORNEY, RICHMOND, VA.; AND GREGORY S. LASHUTKA, CITY ATTORNEY, COLUMBUS, OHIO

Mr. LOGAN. Thank you. My name is Robert Logan. I am the city attorney for the city of San Jose, and I represent here today the National Institute of Municipal Law Officers, as chairman of its municipalities and antitrust committee, as well as the California League of Cities.

I will first answer the question asked by Senator Thurmond as he began this hearing, the question of which approach is the most satisfactory. In my opinion, and that of most city attorneys I have spoken with, the judicial approach is not satisfactory; the vagueries of a case-by-case resolution of a situation like this create at best, a hit-and-miss policy. The only real index or criteria we can look to are the decisions of the Supreme Court itself, and it only hears one-hundredth of the possible cases that are involved.

In testimony that I have submitted, which you will have on file, I have listed areas of governmental concern that will be impacted by the antitrust laws. A short analysis of that will indicate very quickly that nine-tenths of all city activities are covered because of their anticompetitive potential.

The States of California and Ohio are strong charter, local home-rule-type States, and we do not think that the solution is for State legislatures to grant cities immunity or exemption, for a couple of reasons. The first reason is that we do not want to go to the State hat-in-hand, for every little thing we want to do, but the second, and more important reason, is that to go that route, in effect rewrites the State constitution for the State of California with regard to the intergovernmental relationship between the local governments in California and the State——

Senator METZENBAUM. What kind of legislation do you think we should have? You are saying what we should not have. What do you think we should have?

Mr. LOGAN. I am not in disagreement with legislation that along the lines that Mayor Moody from Ohio suggested. That type of legislation preserves, in effect, those things which local agencies have had all along, that is, the ability to act in discretionary matters where the legislative body, the elected body of the people, makes a decision, rather than extending that to administrative officials making decisions.

Senator METZENBAUM. He says that, "The city must establish an affirmative policy of substituting regulation or monopoly public service for competition" and then, the city must actively supervise the policy. What does that mean, "effectively regulate"? I do not understand what that term means in this context.

Mr. LOGAN. Well, his proposal was new to me this morning. I have not discussed that. But the idea, I think, that underlies it is that if we are going to become involved in anticompetitive activities by local regulation, and we are talking about moving to the local level that which is already inherent at the State level as a result of preemptions and the doctrines of immunity, if the local——

Senator METZENBAUM. You should already get that. So Congress does not have to give you the right to get the immunity from the State——

Mr. LOGAN. That is correct.

Senator METZENBAUM [continuing]. Because the State can give that to you, and if you cannot get it, that is your problem.

Mr. LOGAN. That is correct.

Senator METZENBAUM. So there is no reason to come to us in Congress and say you ought to get the State immunity through a congressional enactment.

Now, the next question that I have of you—and I think I am going to ask this of each of the attorneys, if I can remain that long—is, what are you proposing that Congress enact other than that which you can already get under the law, and that is, you can get immunity under the State law?

Mr. LOGAN. I think we are proposing that the court-decided State solution and the creation of State immunity through court decisions be changed so that we preserve within those States the intergovernmental relations that now exist; for instance, charter cities in California, as in Ohio, can make certain decisions in areas of municipal affairs that are not impacted by the State, and in fact, in

some instances, could be preemptive of State laws, assuming that it was a legitimate municipal affair.

Senator METZENBAUM. Would that mean that you can actively and totally engage in anticompetitive activities without any restraint whatsoever? Is that what you are saying?

Mr. LOGAN. I think what we are saying is, to the extent that the State can do that, then local agencies can.

Senator METZENBAUM. Then, why don't you go to the State and get that immunity? Why ask us to do it?

Mr. LOGAN. Because it is not clear what the court really means when it says the State would affirmatively express and clearly articulate standards by which we could act, but it does not talk about supervision. And it is totally unworkable for the State of California to supervise every municipal activity of 22 million people.

Senator METZENBAUM. Well, let us assume that some of us in the Congress are not prepared to just grant you carte blanche exemption, that we think that notwithstanding the fact that you are elected public officials that you do have some responsibility to the consumers, to the public, not to engage in anticompetitive practices, and that when you do, the burden of proof is on you to prove why you are doing it. Now, under those circumstances, I think the responsibility falls on the municipalities to come forward and explain to us what legislation you would advocate passing which would provide the competitive aspects where they should be, and I think the taxicab one that I just gave a few minutes ago is probably just as good as any. I had not thought of it before this meeting, but it seems to me that it is most applicable. And just to come to us and say, "Well, we are small, and we do not have the money, and we need your help, and please help us," I do not think is going to fly. And therefore, I think you have to look at both sides of the coin and see what a reasonable approach is. And what I have heard so far this morning has not convinced me that anybody has really zeroed in on the problem. The mayor of the city of Columbus is well represented by his attorney and counsel here, and says that you have to establish an affirmative policy of substituting regulation or monopoly public service. Well, the question is, if it is regulation, you always have regulation. Cities are always doing that. You regulate the cable TV, you regulate the taxicab companies, you regulate the garbage, but the question is, how does that meet the challenge and the problem of the question of an antitrust exemption and still providing competition.

Mr. LOGAN. And I agree that——

[Whereupon, the chairman resumed the Chair.]

The CHAIRMAN. Now, what I would like to do, I would like to hear all of you first, and then the Senators can ask questions after that. But I have got to leave in a little bit, and I want to hear what you people have to say. Now, we will start right here with you, and then you and you, and I will give you 5 minutes each, and we will ask questions after you get through.

Mr. LOGAN. I think I have fundamentally stated the position. We do not believe the court or the State immunity system is adequate; it is a national policy that we want to see created. Even if it were to be negative for cities, at least we would have something clear, that we can see, that we can work with, and that we can defend

against, which is clearly what we do not have now. The *Boulder* case has left everybody hanging out, trying to figure out just exactly what the court is going to do next.

Thank you, Senator.

Mr. WITT. Mr. Chairman, I am John W. Witt, the city attorney of San Diego.

The CHAIRMAN. If you could tell us now if this decision is bad; if you can tell us in 2 or 3 minutes, or tell us what you recommend. In other words, we want to get your opinion. If it needs correcting, what do we need to do?

Mr. WITT. I think my opinion in that regard, Senator Thurmond, would be mainly cumulative. I just thought I would comment on a couple of the things that have been said this morning by previous witnesses and then be available for questions, if I may.

Mr. Baxter's statement that the *Boulder* decision does not hold that anyone has violated the antitrust laws is partially true—but only partially, I think. If one reads the trial judge's two opinions in the case, one does not have to read between the lines too much to get the distinct feeling that the judge thinks *Boulder* violated the antitrust law, and it is now back before that same judge. And it is ironic, as Mayor Hayes pointed out, that *Boulder's* act, which the plaintiff alleges to be anticompetitive, was really meant to open up the community to more competition. This is the sort of uncertainty that local government officials are concerned with at this time.

Mr. Baxter compared that uncertainty with the uncertainty of risk for private industry, as opposed to such uncertainty for municipal government, and that fails, it seems to me, to recognize the fundamental difference between the functions of the two. Private sector business organizations are supposed to take risks. The higher the risk the higher the return. Municipalities are not organized to take risks, and indeed have the responsibility not to risk taxpayers' assets at all. And I think that, again, is why we are here. We are trying to minimize that risk.

Finally, I would like to emphasize that under the present state of antitrust law, there is the likelihood that municipal decisions will be made not on the basis of the public interest, but rather, on the basis of avoiding an antitrust lawsuit, with all the expense of the defense of such a lawsuit and without regard to ultimate liability. And that result, I think, is bad public policy.

Moreover, the present state of antitrust law does nothing to encourage talented and devoted people to serve in elected and appointed positions in municipal government where there is a potential for being personally named as an antitrust defendant for a governmental decision honestly made. And I would once more emphasize the cost of defense in these cases, irrespective of what the potential for liability is, is a major concern to local government.

Thank you.

The CHAIRMAN. Thank you.

You may proceed.

Mr. HEFTY. Senator, I am William Hefty, city attorney from Richmond, Va.

Both Professor Baxter and Professor Areeda stated that they were concerned about the burdensome litigation cities would have

to face following *Boulder*. Richmond is currently in litigation similar to what many cities will face following *Boulder*.

The case that is currently pending in Federal district court against the city of Richmond is an antitrust action alleging damages of $250 million against the city and its officials, both in their official and individual capacities. It is a zoning case wherein the city denied a building permit and a plan of development to a hotel, which was to be built in an area other than that where the city felt hotel development had to occur for the city's benefit. Now, $250 million damages in an antitrust case in the private sector may not be abnormal, but for a city to face that amount of liability is abnormal, and it is a frightening prospect for city officials.

As a basis of comparison, the city of Richmond's budget for the year 1982-83 is a little under $250 million. Thus the damages sought in the lawsuit are slightly higher than the city's annual budget. In addition, the suit names as individual defendants the city manager, the mayor, the director of planning, each the director of the housing authority, and the city attorney, each for damages of $250 million.

Obviously, these figure are prohibitorily high for a city. It would be disastrous to the city of Richmond if it were to lose this litigation. But what I would like to emphasize is the expense of the litigation, even if the city ultimately is victorious. Antitrust litigation is new to cities, and most city attorneys' offices do not have the staff to handle such litigation. In the *Richmond* case, since I am an individual defendant, I am not counsel of record for the city. The city has hired outside counsel, Covington & Burling, which has extensive antitrust expertise, to defend the case. Cities smaller than Richmond have even less capability to handle antitrust cases.

One important point concerning antitrust liability for cities, as mentioned before, is that it affects all cities, large and small. Small towns have as much potential liability in this area as large cities, and they too will have to hire outside counsel.

In looking at the way the antitrust cases—without legislation will proceed, it is my opinion that most will go to trial and will not be decided on summary judgment, since I think they are factual cases. If there is a rule of reason that is going to be applied to cities as a defense, it is going to be a factual defense, one that is going to have to be developed through extensive discovery, and use of expert witnesses. This is expensive litigation; for example, it could easily cost the city of Richmond hundreds of thousands of dollars to successfully defend the current case. This is what cities across the country are concerned about.

And most importantly, the moneys necessary to defend these cases will come from the taxpayers. This is another distinction between the public sector and the private sector in the antitrust area and the best example of why the cities feel that legislation is needed from Congress in this area.

The CHAIRMAN. All right.

Mr. LASHUTKA. Thank you, Mr. Chairman. I know we are running a little late, so I will keep my remarks very brief. I furnished to you earlier a paper written regarding *Boulder,* and will allow that, if you so permit, to be a part of the record. It is lengthy, and I apologize for that and will condense that later.

I would like to only make three points. First, since 1978, there has been a tremendous shift in the exposure of municipality liability. That same year, the case of *Monell* also opened up cities as potential violators of the civil rights cases. The extension of *Lafayette* through *Boulder* produces a new law in which cities can be exposed to the antitrust laws. Those cases as best those of us who are practicing in the municipal arena, have produced a tremendous chilling effect upon the operation of government. Much like Mayor Tom Moody has presented to you, the operation of Columbus and other charter cities which approximates over 40 percent of the States across this country, are really in a critical dilemma

On one hand, exercise of home rule autonomy through police powers and regulations will expose many cities to antitrust court litigation. On the other hand, antitrust exposure can be avoided by returning regulatory authority to the States. Consequently, those in local legislative and executive positioins have the difficult task of choosing between State versus local control. If one resides in a State like Ohio, Senator Metzenbaum's State, we have found that State fiscal problems dominate the day in our State legislature. There is little time for the State to be sensitive to the local regulatory process.

Second, as we look toward what have been traditional municipal law concerns, antitrust considerations are totally new. Professor Baxter discussed private companies dealing with antitrust concerns over the years, this is not so for municipalities. In fact, the current body of antitrust law must be stretched to apply to public bodies. The law is very murky for those who are municipal lawyers and who must navigate the legal positions of the cities through the rocks and shoals of antitrust law. Neither *Lafayette* nor *Boulder* provide clear guidelines.

Given the scope of traditional governmental activities, we find the modern municipal corporation changing, away from those issues that were brought up in *Ussery,* which talked about fire protection, police protection, sanitation, public health, parks and recreation, and entering new activities which do not fit the traditional roles, be they cable television, or other complex matters such as trash-burning, powerplant facilities, which are unique to the new municipality. We find this to be an area in which the advice we have to give is very confusing. There is no guidance currently in the law. The dual capacity of city governments in administering public policy and providing services does not find any guidance for us in the case law under either *Lafayette* or *Boulder*

I would also suggest to you also that Justice Stevens, in *Boulder* was correct in indicating that the violation issue is significantly different from the immunity issue and is not simple. I do not believe, and the rest of my brethren here at the table concur, that the answer falls with the legislative process on the State level.

Further, I believe that it will take too long and not provide the speedy guidance we need now on a municipal level, to have the Federal judiciary respond. It is my position that only this committee and Congress can provide the needed assistance we need. Without locking into specific language, I would endorse that proposal which Mayor Tom Moody suggests; that three-pronged test would be consistent with the *Lafayette* and *Boulder* cases and other cases

that have taken place with the private sector. There is no need to repeat that three-pronged test.

I do appreciate your time, and should you have any questions, I would be more than happy to respond.

The CHAIRMAN. Thank you.

We have a few questions here. Would it be all right to submit those to you and let you answer them for the record?

Mr. LASHUTKA. Yes, sir.

Mr. WITT. Certainly.

The CHAIRMAN. That will give you more time to think them over, too.

Now, what chance is there, do you feel, to get the Governors' Association, the Attorneys General's Association, the municipal associations, and the League of Cities all together to see if they can agree on a bill?

Mr. LOGAN. I think to date, there have already been discussions to get together with those groups, and the difficulty has been, from the best information I have received, that the attorneys general's and the Governors' group just have not reached a position yet where they want to sit down and really talk.

Now, Mr. Beals, with the National League of Cities, is in the room, and some of his counsel are in the room, and they might be able to respond to that a little more clearly.

The CHAIRMAN. Who is here from that association?

Mr. LOGAN. Alan Beals is here. He is the director of the National League.

Mr. LASHUTKA. Mr. Chairman, he was here; he is not here any longer.

Mr. LOGAN. Well, counsel is here. Cynthia Pohls is here. She is counsel to the league, and she might be able to respond to that.

The CHAIRMAN. Is she in a position to make a statement?

Ms. POHLS. The only statement I can make is that we have begun some discussions with the National Governors' Association, the National Association of Attorneys General, the National Conference of State Legislatures, and none of them at this point, I think, have yet developed a definite institutional position. And, I think, most of them are having annual meetings over the next month, at which time they presumably will come up with some kind of a position, and it will be a little easier for us to see what kinds of common points there may, in fact, be. Right now, it is difficult.

The CHAIRMAN. Do you think there is opportunity to get all these groups together?

Ms. POHLS. I think so.

The CHAIRMAN. Now, who would take the responsibility of calling them together?

Ms. POHLS. Well, we do have a big southern group which does include most of them, that meets regularly.

The CHAIRMAN. If you want to tell them that the chairman of the Judiciary suggested that you all get together——

Ms. POHLS. Oh, sure. [Laughter.]

The CHAIRMAN. Now, I want to help you, but I cannot help you and get through legislation, probably, if you have got powerful groups like the attorneys general and the Governors opposing your legislation. I think you have got to get together if you can and

agree on some legislation, because it is hard enough to get legislation through here when there is not such strong opposition. But if you have got your mayors on one side and the city attorneys on another side, and you have got the Governors and the attorneys general, and you see there is a clash, it is very hard to reconcile, and you have Senators taking sides, and as a consequence, you may get nothing. So, I think it is important that all of you make up your minds you want to give and take and get through something that will protect you.

I strongly feel that the cities and the counties and the States have got to be protected better, or maybe your taxpayers are going to have to pay out a lot of money in lawsuits if you do not.

Now, I am interested in the taxpayers and interested in the citizens generally not having to bear burdens that they should not have to bear. So, if you all will get together and see what you can come up with, we would appreciate it.

Now, the lawyers here will give you some questions; you can get them before you leave, or we will send you a letter to answer some certain questions we have for the city attorneys.

We thank you very much for your appearance here, and I think it will be worthwhile to focus on these questions.

We now stand adjourned.

[Whereupon, at 12:15 p.m., the committee was adjourned.]

[Prepared statements follow:]

ANTITRUST LITIGATION AND MUNICIPALITIES: A NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS SUMMARY

Submitted by Robert J. Logan

The National Institute of Municipal Law Officers (NIMLO) is an organization of over 1700 member municipalities. The member local governments operate NIMLO through their chief legal officer, variously called city or county attorney, corporation counsel, city solicitor or law director. NIMLO is the only national organization of municipal legal officials.

This report consists of an Introductory Statement, a summary of the results of the NIMLO survey, and the 1981 Annual Report to the National Institute of Municipal Law Officers from the Committee on Antitrust Law and Municipalities, Robert J. Logan, City Attorney, San Jose, California, Chairman, which includes the historical evolution of municipal liability under the federal antitrust statutes.

I. INTRODUCTORY

Since 1978 and the Supreme Court decison in City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978) holding that cities are "persons" covered by the federal antitrust statutes, municipalities have become increasingly alarmed about their potential liability for monetary damages under Federal antitrust laws.[1] It should be noted that there is no mention of municipal liability under the Federal antitrust laws in either the legislative history of the various statutes or in the statutes themselves. The application of the Federal antitrust statutes to local governmental activities is strictly a judicial creation.

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[1] Sherman Antitrust Act of 1890, 15 U.S.C. §1 et seq.; Clayton Act of 1914, 15 U.S.C. §12 et seq.

The Supreme Court's decision this term in Community Communications Co., Inc. v. City of Boulder, 102 S.Ct. 835 (1982), set off an alarm bell in local governments. That decision, holding that a broad delegation of home rule powers by the states to local governments was insufficient to exempt municipalities from the Federal antitrust laws, is viewed as an open invitation to sue municipalities for treble damages[2] and attorneys' fees[3] for perceived violations of the Federal antitrust laws.[4]

In addition to the enormous potential monetary costs, the application of Federal antitrust laws to local governments has the potential to destroy many traditional aspects of local governmental regulation.

In response to the Supreme Court decision in Boulder, NIMLO undertook a poll of its members concerning their experiences since 1978 with lawsuits involving the antitrust laws.[5] The responses to the NIMLO survey indicate that alleged antitrust exposure now extends into many areas where citizens have long come to depend on local government;

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2 15 U.S.C. §15

3 Id.

4 It is ironic to note that the cable television moratorium which was the subject of the antitrust suit in Boulder was instituted by the city in order to foster competition. The City of Boulder was seeking to encourage additional bidders for the franchising of new territories within the City, and instituted a moratorium in part to prevent Community Communications from expanding into these new areas and thus monopolizing Boulder vis-a-vis other potential cable providers.

5 The questionnaire is attached as Exhibit A to the Summary of the Results of the NIMLO Survey.

these suits strike at the heart of the very existence of local government.

Municipal decisions relating to land use and zoning have come under attack via antitrust suits. Municipal exposure extends into the areas of water supply, airport use and concessions, waste disposal, cable television franchising, energy recycling, ambulance service, police towing, taxicab franchises at airports, municipal hospital services, recreational facilities, business licensing, operation of municipal civic centers and auditoriums, and even mass transit. In this time of high energy costs and the increased awareness of the need for energy conservation, municipalities are particularly concerned about the antitrust implications of constructing and fueling energy recycling plants.

The bulk of this report consists of a summary and analysis of the NIMLO survey of its members. It should be emphasized that this poll is really preliminary in nature, as this survey was taken just weeks after Boulder was decided. As bleak a picture as this survey presents, the real brunt of antitrust suits is sure to follow in the wake of the Supreme Court's most recent action.

The Impact of Antitrust Exposure Upon the Local Governing Process

In an era when the Federal government is seeking to turn back much of the responsibility for governing to the local level, it is imperative that our local governments have the ability to forcefully and efficiently carry out their new and ever increasing

responsibilities. The application of federal antitrust laws to the activities of local governments cripples local authority at a time when our citizens are looking more and more to the local level for the solutions to their problems.

NIMLO has noted the following results from antitrust lawsuits against municipalities:

i) Local governments are being forced to devote increasing amounts of time and energy towards dealing with antitrust-related issues.

ii) Businesses and individuals now have a new and powerful weapon with which to attempt to control or to influence municipal actions, taken in the public interest, for their own personal gain. Applicants who seek municipal franchises, permits, concessions, or contracts and are denied them may take action under the Federal antitrust statutes and have the potential to recover treble damages, attorneys' fees and court costs.

iii) Municipal land use decisions, intimately affecting the character and development of local communities, are being made not with an eye to the public interest, but with worry over antitrust implications.

iv) Municipal projects, often clearly in the public, as well as national interest, are being delayed in the face

of actual or threatened lawsuits. Several municipalities have informed NIMLO that they are delaying construction of waste recycling plants in light of potential antitrust problems.

v) Projects are being delayed to enable municipal officials to review the activities of their governments in light of the Federal antitrust laws. The result is delay or denial of a host of essential unprovided services while steadily escalating cost figures must be factored in.

vi) The monetary awards sought in antitrust suits, when subject to treble damages, attorneys' fees and court cost provisions of the Federal antitrust laws, can reach astronomical sums. These amounts, if awarded, will cripple many local governments and raise local taxes to ever higher amounts; the taxpayers must foot the bill.

vii) Even where the defendant municipality ultimately prevails, the expenses incurred in defending antitrust suits are great. Given the highly technical nature of antitrust law, municipalities must often resort to expensive outside counsel to defend themselves.

The Need For Federal Action

As the attached explanation of the current state of the law makes clear, the liability of municipalities for violations of Federal antitrust laws is entirely dependent on the application

of state law. Such a state of law is contrary to a Federal antitrust policy because it may yield contrary results in identical situations.

For example, Chicago, Illinois and Gary, Indiana might have identical policies regarding the regulation of taxicab franchises. Chicago's policy might be found valid, and Gary's policy might be invalid, depending on the grant of state authority under which each is operating. Thus, identical policies might be of different legality under a single Federal antitrust statute. In short, the application of federal antitrust laws is dependent, in the case of municipalities, upon the vagaries of varying state regulation.[6] It was certainly not the intent of the authors of the Federal antitrust statutes to have the application of the Federal law be dependent on state regulation.

The law as presently constituted has many deleterious effects for municipalities. Most importantly, it puts municipalities at the mercy of state legislatures vis-a-vis Federal regulation. While state legislatures undoubtedly have the right to control

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[6] In several cases decided since Boulder, the courts have found widely differing state statutory schemes sufficient to satisfy the state action exemption. In Gold Cross Ambulance v. City of Kansas City, ___F.Supp. ____ (W.D. Mo. May 7, 1982), the Court held that a state statutory scheme authorizing municipalities to provide ambulance service and licensing ambulance and personnel was sufficient to satisfy the state action exemption. In Pueblo Aircraft Service, Inc. v. City of Pueblo, ___F.2d ___ (10th Cir. Apr. 13, 1982), the court held that a state statutory scheme authorizing municipalities to acquire and operate municipal airports was sufficient to satisfy the state action exemption. In Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc., ___F.Supp. ____ (W.D. Ky. Mar. 15, 1982), the court held that a constitutional provision authorizing municipalities to franchise public utilities was sufficient to satisy the state action exemption. While we believe these cases are correctly decided, we single them out to illustrate the very real possibility that similar regulatory schemes at the local level may produce different results when subjected to antitrust challenge based on the state statutory scheme

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municipal policy through state regulation, there is no concomitant right in the states to control municipal actions through federal regulation. The application of federal antitrust laws is a federal concern, reflecting a national policy, which should be dependent on federal law, not state law.

Under current law, municipalities are liable for federal antitrust violations absent state exemption. Many state legislatures are unwilling, unable, or apathetic towards the grant of specific exemptions. The current piecemeal approach must be changed so that all municipalities are treated equally, fairly and equitably under federal statutes. One antitrust law should have one application, not fifty varying applications.

The Magnitude Of Antitrust Claims Against Municipalities

The survey and additional research indicate that since the Supreme Court, in 1978, found that municipalities may be held liable for antitrust violations, claims in excess of $743 million dollars have been filed against 43 municipalities.[7]

This figure does not begin to approximate the total claims made against municipalities in the antitrust area. Nor does this figure represent additional claims for court costs, attorneys' fees, or the costs of any equitable relief.

Moreover, most of the suits do not state the dollar amount of the damages claimed, but merely request "any damages that may be

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[7] Of course, not every claim for relief is reduced to judgment in the amount of the claim. However, the NIMLO survey covers only 300 municipalities out of a total of 39,000 local governments in the United States. Assuming that only 1% of the claims ripen into judgment, and that like amounts of claims have been made against the municipalities that were not surveyed, it is estimated that the claims could ripen into judgments totalling $965 million dollars in local tax revenues. This calculation does not include any claims not apparent from the face of the pleadings.

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shown" or "such other relief as the Court deems just." There is no way of ascertaining the additional value of these claims.

by

Charles S. Rhyne, General Counsel
Martha B. Pedrick, Associate General Counsel
Peter H. Maier, Associate General Counsel

PREPARED STATEMENT OF GREGORY S. LASHUTKA, CITY ATTORNEY, COLUMBUS, OHIO

MUNICIPAL ANTITRUST EXPOSURE AFTER BOULDER

The lesson of Boulder is that local governments cannot rely upon Parker v. Brown to shield their activities from federal antitrust scrutiny. Municipalities will continue to assert immunity in antitrust litigation, and depending upon the activity and the state statutory or constitutional provisions involved, some will succeed in invoking Parker v. Brown. But given the extensive sphere of activities of a modern municipal corporation, and given the limitations which Boulder places upon the availability of Parker v. Brown immunity to local governments, it is unlikely that such immunity will apply to most municipal conduct challenged under the antitrust laws. It is important, then, to consider what standards of liability apply in the absence of municipal immunity and to consider what remedies are available against municipalities. Unfortunately, the answers to such questions are largely speculative at this time.

A. What Standards of Liability Apply?

In the final footnote to his majority opinion in Boulder, Justice Brennan stated as follows:

> We hold today only that the Parker v. Brown exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants.[1]

Justice Brennan went on in that footnote to quote the following passage from Lafayette: "It may be that certain activities, which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."[2] Justice Brennan also cited Exxon Corp. v. Governor of Maryland,[3] where the Court had stated that anticompetitive effect standing alone is an insufficient basis for invalidating a state law. Justice Stevens, although joining the majority opinion of Justice Brennan, issued a separate concurring opinion emphasizing that in both Lafayette and Boulder, "the violation issue is separate and distinct from the exemption issue."[4] Furthermore, according the

Justice Stevens, "the violation issue is not nearly as simple as the dissenting opinion implies."[5]

The analysis which dissenting Justice Rehnquist suggests may be appropriate after Boulder is hardly "simple". Justice Rehnquist suggests that Boulder will result in many "troubling consequences" for the courts, including "whether the 'per se' rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants."[6] According to Justice Rehnquist, the most troubling questions will concern the factors to be considered in applying the Rule of Reason to municipal activities.[7] As Justice Stevens wrote for the Court in 1978, the Rule of Reason is not a generalized test of reasonableness:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.
>
> . . .
>
> [T]he inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. 'The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'[8]

As Justice Rehnquist notes in his dissent in Boulder, under the traditional application of the Rule of Reason, "an ordinance could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects."[9]

The Boulder majority and the Lafayette plurality have suggested that the standard of antitrust liability applicable to municipalities may somehow be different from that applicable to private individuals. The Court has not, however, provided any clue as to the municipal standard it may ultimately adopt. Under such circumstances, it is to say the least difficult for municipal lawyers to chart a course of conduct responsive to Lafayette and Boulder.

It may be that although home rule provisions and most state statutory provisions will not give rise to immunity for municipalities after Boulder, such provisions will be found to be pertinent to the underlying liability issue. If a municipality can point to a source in law which authorizes it as a local governmental entity to engage in the kind of activity which is challenged under the

antitrust laws, it will have taken a step toward distinguishing its challenged activity from like activity engaged in by a private individual. Similarly, it may be useful in attempting to distinguish a municipal defendant from a private defendant to invoke the "traditional governmental functions" language and analysis of National League of Cities v. Usery[10] if the challenged activity is arguably within the sphere of conduct in which local governments have historically engaged.

Justice Stevens' concurring opinion in Boulder and the conclusion to Justice Brennan's majority opinion both suggest that the unavailability of Parker v. Brown immunity will not necessarily subject a municipality to the same standard of liability imposed upon private individuals. Believing as we do that Boulder renders Parker v. Brown immunity unavailable to municipalities for most of their regulatory and other activities, we can only wish that the Supreme Court had seen fit to provide some guidance concerning the liability standard to which municipalities will be subject. Until such guidance is forthcoming, local political subdivisions which wish to minimize their antitrust exposure can undertake the arduous task of analyzing all their activities in light of the antitrust standards which are applicable to private individuals. It is not within the scope of this presentation to provide a survey of antitrust law, but the analysis would proceed something like this: First, does the municipal activity have an adverse effect upon competition in any market? If so, is the activity in the nature of one that has been declared a per se violation, such as price fixing? If not, is the activity lawful under the Rule of Reason, or, put simplistically, does the activity tend to promote competition more than to suppress it? In practice, of course, application of the antitrust standards requires considerably more sophistication than is suggested by the questions posed here.

Attorneys who attempt to apply such standards of liability to municipal activities may find that many governmental activities do not readily lend themselves to such analysis. We have, however, few other tools to turn to until the Supreme Court establishes a standard for municipal antitrust liability.

B. What Remedies Will Lie?

Both the Lafayette plurality and the Boulder majority pointedly left open the question of what remedies are "appropriate" in the case of municipal antitrust violators[11]. The implication is that treble damages, and perhaps even actual

damages, may not be available from municipal defendants. Justices Blackmun and Rehnquist have both noted the seemingly mandatory language of the Clayton Act concerning the award of treble damages,[12] but a majority of the Court seems to view the question as an open one. It is perhaps noteworthy as regards the treble damages question that a divided Supreme Court held that municipalities are immune from punitive damages awards under a principle federal civil rights statute, 42 U.S.C. § 1983.[13] The Court's resolution of the question of antitrust damages available against municipalities may directly affect their liability for antitrust plaintiffs' attorney fees, because many lower courts have held that attorney fees are available only to plaintiffs who obtain a treble damages award.[14]

Whatever the ultimate resolution of the damages question, Boulder clearly stands for the proposition that injunctive relief is available against a municipality under the federal antitrust statutes. Even if the Court ultimately holds that no damages or attorney fees are available against municipal defendants, the availability of injunctive relief will subject municipalities to complex and costly litigation and may result in federal equitable decrees concerning matters which have heretofore been considered subject to the lawful control of local governments.

Because Parker v. Brown immunity arose not by statute but by judicial decision, the Supreme Court has had an especially free hand in determining the scope of the doctrine. In the years immediately preceding the Lafayette decision, the Supreme Court had issued several decisions which served to narrow and define the limits of Parker v. Brown immunity.[15] The timing of the Lafayette and Boulder cases was also unfortunate in that these cases arose when the Court was expanding municipal exposure on another principle liability front, the federal civil rights laws.[16]

Although it may be useful for municipalities to approach their state legislatures for statutory authority concerning specific municipal activities which present a substantial threat of antitrust liability, it is probably neither feasible nor wise for municipalities to seek state legislation concerning every activity for which they are presently at some risk under the antitrust laws. Because Boulder's treatment of the home rule question suggests that state efforts to grant sweeping powers to their political subdivisions will suffice to invoke Parker v. Brown immunity, and realistic effort to convey immunity by state legislation would require specific statutory authority concerning each of the multitude of activities

presenting a risk of exposure. Moreover, if the Supreme Court ultimately imposes the Midcal "active state supervision" requirement upon municipalities seeking the Parker v. Brown immunity, only that legislation which imposes active state supervision upon the municipal activities will give rise to the immunity. Should the Supreme Court ultimately establish a liability and remedy test which is acceptable to cities, those municipalities which rushed in the interim to seek state legislation may regret their haste.

If the Supreme Court's ultimate resolution of the liability and remedy issues left open in Lafayette and Boulder is unacceptable to municipalities, the solution lies not with the state legislatures but with Congress. It is within the realm of possibility, however, that Congress will not grant municipalities leave to violate the antitrust laws in all their activities. We suspect that in one form or another, antitrust law is here to stay for the municipal lawyer.

Footnotes

1. Id., at 4148 n.20.
2. Id., quoting from 435 U.S. at 417 n.48.
3. 437 U.S. 117, 133 (1978).
4. 50 U.S.L.W. at 4148.
5. Id. at 4149.
6. Id. at 4150.
7. Id.
8. National Society of Professional Engineers v. United States, 435 U.S. 679, 688, 691 (1978).
9. 50 U.S.L.W. at 4150.
10. 426 U.S. 833, 852 (1976).
11. 50 U.S.L.W. at 4148 n.20; 435 U.S. at 401-402.
12. 50 U.S.L.W. at 4150 n.2 (Rehnquist, J., dissenting); 435 U.S. at 442-3 (Brennan, J., dissenting).
13. City of Newport v. Fact Concerts, Inc., 69 L. Ed. 2d 616 (1981).
14. See, e.g., Byram Concretanks, Inc. v. Warren Concrete Products Co., 374 F. 2d 649 (3d Cir. 1967); Knutson v. Daily Review, Inc., 479 F. Supp. 1263 (N.D. Cal. 1979); Locklin v. Day-Glo Color Corp., 378 F. Supp. 423, 428 (N.D. Ill. 1974).
15. Bates v. Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
16. Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).

LOCAL GOVERNMENT ANTITRUST LIABILITY: THE BOULDER DECISION

TUESDAY, AUGUST 31, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Columbia, S.C.

The committee met, pursuant to notice, at 11 a.m., in the Senate Chamber, the State House, Columbia, S.C., Hon. Strom Thurmond (chairman of the committee) presiding.

Staff present: W. Stephen Cannon, chief antitrust counsel, and Deborah R. Shupe, research/investigator.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The hearing will come to order.

Last January, the Supreme Court of the United States ruled that local governments, unlike States, could be held liable under the antitrust laws of enacting ordinances found to be anticompetitive. Specifically, the Court found that the delegation of powers to a city by the State through home rule was insufficient to shield the city with *Parker* v. *Brown* State action antitrust immunity.

This case, *Community Communications Company, Inc.* v. *City of Boulder,* has recently been the subject of intense interest and debate among those involved in any way with local government. Speculation over the effect of *Boulder* on the numerous and varied aspects of running a city or town has been abundant. While the *Boulder* majority opinion suggested that its decision did not "threaten the legitimate exercise of governmental power," the dissent concluded that the court's action would "impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare."

As our witnesses will not doubt point out today, the range of local activities potentially affected by the *Boulder* decision are quite diverse, ranging from procurement, to zoning, to the operation of airports and sports arenas. It is my understanding that numerous antitrust cases naming local governments as defendants are currently pending in the Federal courts. A basic concern we all have, of course, is the impact a treble damage verdict could have on those who may eventually have to pay such damages—the taxpayer.

As chairman of the Senate Committee on the Judiciary, I have come to Columbia to explore the ramifications of *Boulder,* and to determine what, if any, legislative response is desirable. Some antitrust and municipal law authorities cite the need for congressional

action; others suggest State legislative action may be appropriate; and still others would prefer to let the courts resolve all questions raised by this decision. I hope that our distinguished witnesses will address all three of these possibilities.

We are very pleased to have a broad array of outstanding municipal officials in this chamber today, including those who are representing cities in our neighboring States of North Carolina, Georgia, and Florida. In addition, it is also a pleasure to welcome Donald Russell from Sonoco in Hartsville, one of South Carolina's outstanding corporate citizens. I look forward to receiving your testimony and know that it will greatly help the committee as it studies this complex matter.

Mayor Dodds, you may proceed.

STATEMENT OF JOHN J. DODDS, JR., MAYOR, MOUNT PLEASANT, AND PRESIDENT, MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

Mayor DODDS. Senator Thurmond, I am John J. Dodds, Jr., mayor of Mount Pleasant and president of the Municipal Association of South Carolina. I want to thank you personally and on behalf of the membership of the municipal association for arranging your busy schedule to receive testimony from local government officials on the impact on State and local governments of the U.S. Supreme Court's decision in *Community Communications Co.* v. *City of Boulder*.

Although I am not a lawyer, it is clear to me as one involved in the daily operations of a town government, that the Supreme Court's action in the *Boulder* case creates many problems of city, county and State governments. The municipal association believes that Federal legislation granting a local government exemption from antitrust liability is the most feasible solution to the uncertainties and problems created by the *Boulder* decision.

As you know, Senator, South Carolina is a State composed of relatively small municipalities in comparison to the populations of municipalities in neighboring States. There are 268 incorporated municipalities in South Carolina: 190 have a population of less than 3,000; only 8 have a population of 25,000 or more; and our largest municipality has a population of approximately 100,000 people. Regardless of the population size of a particular municipality, all derive their powers and authority to provide services from general statutory law enacted by the general assembly. The Home Rule Act of 1975, adopted pursuant to a change in the State constitution, in a sense freed local governments from legislative dominance in administering local affairs and conferred upon municipalities a greater degree of local self-government. After reading the opinion, I am in full agreement with Justice Rehnquist when he predicted in the dissenting opinion that:

> By treating the municipal defendant as no different from the private litigant attempting, to invoke the *Parker* doctrine, the Court's decision today will radically alter the relationship between the States and their political subdivisions, municipalities will no longer be able to regulate the local economy without the imprimatur of a clearly expressed State policy to displace competition. The decision today effectively destroys the "home rule" movement in this country, through which local governments have obtained, not without persistent State opposition, a limited autonomy over matters of local concern.

I have been advised that many of the statutory grants of power authorizing a municipality to perform certain routine functions may not meet the Supreme Court's standard, and, therefore when we, as municipal officials act, we may be exposing ourselves and our municipalities to "grant franchises for the use of public streets and make charges therefor," to "levy a business license tax on gross income" and "to enact regulations, resolutions, and ordinances, not inconsistent with the constitution and general law of this State". As I understand it, in order for a municipality to be exempt from antitrust scrutiny, its action must be "in furtherance or implementation of clearly articulated and affirmatively expressed State policy"; that is, pursuant to specific, detailed State legislation covering specified activities. Further, it appears that the State must "actively supervise" the potentially anticompetitive actions taken by local government. It is highly questionable whether the blanket statutory grants of power, cited above as illustrations. would satisfy the Court's guidelines. Zoning and land use regulations, along with development projects involving joint efforts by local government and private enterprise are other areas of concern.

Disgruntled individuals and businesses now have a new and powerful weapon to use against local government. If a plaintiff can meet the requirements of the Federal antitrust statutes, local taxpayers will be forced to pay treble damage awards, plaintiff's attorney's fees and court costs. Even if a municipality maintains a successful defense, the cost to the public for legal fees and expenses will severely strain, if not break, municipal treasuries. As I mentioned earlier, South Carolina is a State of small towns and we would have great difficulty in finding, let alone paying, antitrust lawyers to prepare and litigate antitrust cases. Just the threat of a lawsuit can be a powerful intimidating force which may cause local government officials to delay or cancel needed public projects and programs.

In 1973 the people of South Carolina voted to give themselves "home rule" local governments so that they could better shape and fashion the services that they wanted those governments to provide. In 1982, the U.S. Supreme Court nullified their vote. The *Boulder* decision denies the people of this State the most basic right to decide for themselves what is best for their community. It restricts the ability of local government to experiment in designing public service delivery systems to meet the needs of South Carolina's expanding population and changing economy.

In closing, the Municipal Association of South Carolina would urge Congress to adopt corrective legislation to provide local governments, as political subdivisions of the State, with the same protection from antitrust liability as afforded the States.

The CHAIRMAN. Thank you. We are very delighted to have you with us. You've made an outstanding record as mayor of Mount Pleasant and are highly respected all over the State.

Our next is Mayor Corinne Freeman of St. Petersburg, Fla.

STATEMENT OF CORINNE FREEMAN, MAYOR, ST. PETERSBURG, AND FIRST VICE PRESIDENT, FLORIDA LEAGUE OF CITIES

Mayor FREEMAN. Senator Thurmond and members of the committee staff, I am Corinne Freeman, mayor of St. Petersburg, Fla., and serve as first vice president of the Florida League of Cities. We of the league appreciate your invitation to appear here and present testimony on the need for Federal legislation to alleviate the impact on the cities of the United States as a result of the *City of Boulder, Colo.*, decision by the U.S. Supreme Court.

When the executive director of our league called asking me to represent the Florida league here, I accepted with trepidation, as I know very little about the antitrust laws. However, I do have some knowledge about being mayor of a city, and I believe that a law which could subject my city to treble damages and attorneys' fees would be devastating and result in an inordinate and unfair burden on the taxpayers of my community.

I am advised that in the *City of Lafayette* case, preceding the *Boulder* decision, respondents sought treble damages in excess of $540 million. If divided among the cities' residents, that penalty would have exceeded $28,001 for each family of four. Because of these devastating possibilities, William Baxter, of the administration's Antitrust Division in the Department of Justice, considers antitrust cases against cities a "serious threat to the political structures of the States." Even though the administration has "not reached a conclusion about a solution," it is watching all aspects of this matter very closely. The cases that have made municipal antitrust liability an issue, Baxter said, all "involve unsound application of the antitrust laws and overly rigid Supreme Court rulings about vertical combinations."

My presentation is partially based on our understanding of the philosophy of federalism as it relates to local government. With me, also representing the league, is Frank B. Gummey, III, city attorney of Daytona Beach, and chairman of the steering committee of the Florida Municipal Attorneys' Association, who will make some brief remarks on the legal aspects of the *Boulder* decision. Also present is Claude L. Mullis, league counsel, who is here to help me out if I get into legal waters that are too deep.

I, along with many others, believe in the right of local government to self-govern in the provision of services to its citizens. In Florida, similar to Colorado, our cities possess constitutional "Home Rule" powers. We fought long and hard for these powers, which were only granted by our newly-revised 1968 constitution, and we would be very reluctant to return to conditions which existed prior to the enactment of our constitutional home rule powers; that is, when our cities could only exercise those powers specifically granted by the legislature and necessarily inferred therefrom. Further, it is likely that a new wave of legislative "local bills" will cloak some cities with State-shared immunity, while others will await more favorable legislators.

The Supreme Court in *Boulder* held that only the State was immune from the Sherman and Clayton Antitrust Acts, and, therefore, in order for a municipality to be immune, it must be performing an act under authority mandating a "clearly articulated and

affirmatively expressed policy of the State." Federal legislation exempting all local governments from the antitrust laws appears to be the only logical cure for this problem. It would be far better for Congress to establish a uniform exemption, as these statutes were enacted by the U.S. Congress, and this would eliminate disparate treatment of the antitrust laws from State to State and city to city. This would also prevent congesting our Federal courts more than they are today because any time a State adopts a "clearly articulated State policy" it would be left to the Federal court to determine the sufficiency of that State's expression and immunization of that State's anticompetitive policy.

We certainly don't want to give the impression that elected officials should be granted immunity when they commit an act of conspiracy against private industry or individuals. But we understand that most States, if not all, make conspiracy a criminal offense, and therefore it should be the individual official who is punished, and not the taxpayers of the local government, by the court's awarding treble damages against the city, particularly since the conspiracy was illegal in the first place. Also, we understand all States, except Georgia, have on the statute books their own antitrust laws.

We do not believe the Congress ever intended the Sherman and Clayton Antitrust Acts to be applicable to local governments, and we understand the courts had so held until recently.

Therefore, Senator, on behalf of the cities of Florida, we urge you and the Senate Judiciary Committee, which you chair, to develop, and Congress to enact into law, an amendment to the Sherman Act and the Clayton Act, exempting all municipal governments from the provisions thereof.

Thank you again for this opportunity to appear before you in the State house of the great State of South Carolina.

The CHAIRMAN. We're very pleased to have you here in our company at the capitol city of South Carolina to testify at this hearing and we wish to thank you for your contribution.

Our next speaker is Mayor Kirkman Finlay of Columbia. We are pleased to have you here today.

STATEMENT OF KIRKMAN FINLAY, MAYOR, COLUMBIA, S.C.

Mayor FINLAY. Mr. chairman, thank you for this opportunity to speak to you on a matter that has ominous implications for local government in South Carolina.

While many uncertainties exist, there can be little doubt that the Supreme Court's decision in the *Boulder* case, if permitted to stand, will cause a restructuring of State and local government relationships not only in our State but in every State of the Nation.

In 1973 the people of South Carolina approved a revised article VIII to the State constitution dealing with local government. Pursuant to the mandate of section nine of article VIII, the general assembly in 1975 passed what is popularly known as the Home Rule Act, and, by so doing, ushered in statutory home rule for South Carolina municipalities. What is now codified as section 5-7-30 is the general powers grant conferred upon all municipalities regardless of size. This section provides, among other things, that:

All municipalities of this State shall . . . have authority to enact regulations, resolutions and ordinances . . . including the exercise of such powers in relation to roads, streets, markets, law enforcement, health and order in such municipalities or respecting any subject as shall appear to them necessary and proper for the security, general welfare and convenience of such municipalities or for preserving health, peace, order and good government therein. . . .

To be sure that the intent of the people was not misinterpreted, the framers of article VIII and the members of the general assembly included additional provisions which make it clear that:

The powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities.

Article VIII, section 17 of the South Carolina Constitution and South Carolina Code Section 5-7-10. Similar provisions were written for the county government.

It has taken years of concentrated effort on the part of many involved people to move the local decisionmaking power away from the State capitol and to the town halls and county seats where it properly belongs. By their holding that the:

State action exemption: Does not extend to the political subdivisions of a State unless the local government action constitutes "either the action of the State itself or municipal action in furtherance of implementation of clearly articulated and affirmatively expressed State policy.

The five-member majority of the Supreme Court reversed the trend toward home rule. Not only has the trend been reversed but it would be a fair statement to say that the traditional sharing of the responsibility for the exercise of general police powers between the State government and its political subdivisions must be refashioned to comport with the Supreme Court's idea of a "dual system of government." It causes me great concern to see the Federal courts inappropriately interfering with the relationship between the States and their political subdivisions under the guise of Federal antitrust laws. The arbitrary distinction drawn by the Court between the State and its political subdivisions mocks the 10th amendment upon which the "State action exemption" is based. Without the use of their political subdivisions to assist in the exercise of "powers reserved to the States," the State governments would have an impossible task exercising their powers to preserve and to promote the general welfare of their people. The Supreme Court's action is a misguided use of the commerce clause of the Federal constitution to invade the 10th amendment powers of the States. By treating local governments as private enterprise business corporations, the Court has crippled the ability of the State to govern in the best interests of its people.

The Court went no further than to say that local governments are now subject to possible liability under Federal antitrust laws when they engage in the exercise of powers which may tend to restrict competition. Municipalities and other units of local government must now look to a specific State statute to find sanction for many actions they now routinely take.

To remedy this intolerable situation, there are three possible courses of action. First, and least desirable, would be to let the Federal courts through case-by-case litigation develop a body of law defining the parameters of *Boulder*. In the meantime, the local gov-

ernment decisionmaking machinery would be paralyzed and local government treasuries would be drained.

The second alternative would be to let the 50 State legislatures begin the process of insulating their political subdivisions from antitrust liability by "clearly articulating" State policy authorizing anticompetitive actions by local governments. This is not a feasible solution since the legislatures would be put in a position of second-guessing Federal judges as to what would constitute a sufficient statement to insulate their political subdivisions. I would point out that the mandate expressed in the revised article VIII of the South Carolina constitution for the general assembly to enact legislation authorizing consolidation of cities and counties is now 10 years old and the general assembly still has not acted.

It is my belief that neither Federal litigation nor State legislation will effectively resolve the problem created by *Boulder*. Since it is a matter of Federal antitrust law and involves basic concepts of federalism, I would urge the passage of Federal legislation to amend the antitrust laws to provide an exemption for local governments. If it is clearly stated that local governments are to be exempt when regulating for the welfare of its citizens, local government can continue to perform its role in the Federal system.

The CHAIRMAN. Thank you, Mayor Finlay.

Next is Mayor Stallings. It's a pleasure to have you here, Mayor Stallings.

STATEMENT OF TRACY STALLINGS, MAYOR, CARROLLTON, GA.

Mayor STALLINGS. It's a pleasure to be here.

I would like to place in the record a copy of the publication of the U.S. Supreme Home Rule Code which has an impact on this and other decisions having to do with this matter to our files of the judicial committee.

I serve as mayor of the city of Carrollton, Ga., a town of about 15,000 population situated approximately 15 miles southwest of Atlanta. We have a mayor-council-city manager form of government, with the mayor and four-member council establishing policy and guidelines and the city manager and other professional staff implementing this policy and managing the provision of basic services on a day-to-day basis.

My vocation is education; I serve on the administrative staff of a public senior college located in Carrollton. Three members of the city council are businessmen and one is a medical doctor. We meet twice monthly and other times as needed, and as mayor I communicate with the city manager virtually on a daily basis. Compensation for the mayor and council is nominal. Our chief motivation for serving in these positions is the rendering of a civic service, not the building of political careers or the earning of a living.

This, or course, is not an unusual circumstance—and that is just my point. It's a situation not unlike that in hundreds of municipalities across the country. Where men and women in local leadership roles strive to make commonsense decisions in behalf of their fellow citizens with the objective of improving and protecting the general health, welfare, and safety of the affected constituency.

Financial resources are necessarily and properly limited, and this is government where the water hits the wheel, where there is instant and continual dialogue between those who are governing and those who are governed. You do the best you can and you are immediately evaluated by your constituency.

One of the services our city renders is that of pickup and disposal of garbage. In the process of providing this basic service we have now come face to face with the problems presented by the *Boulder* decision. In an effort to provide garbage service in the most economical manner the city has employed a "roll-off system." This updating of our service is the basis of a suit presently pending in our U.S. District Court wherein we are accused of antitrust violations along with violations of the civil rights of a local industrial waste hauler.

The decision to provide this service was made after numerous public hearings with input from all affected businesses and consideration to the public health and welfare of the entire city. Providing garbage service is authorized by the Georgia Constitution. The substance of this case remains to be litigated and I have every reason to believe that ultimately the alleged conspiracy and antitrust accusations will be refuted but in the interim we are faced with considerable time and expense in defending something, which, if provided by our State government, would have carried total immunity. This suit was brought very shortly after the Supreme Court decision in *Boulder*. Unless some remedy is given I fear a multitude of suits stemming from every discretionary decision we make in the future could be forthcoming.

I appreciate this committee's interest in seeking a solution. I have no recommendations other than to advance my personal view that we have operated in the past for many years under what we have thought was total immunity. I hope the committee can find a solution for a continuation of that freedom so that we may exercise our discretion and, hopefully, commonsense. I do not seek an atmosphere where we are totally unanswerable but if this discretion is abused, I think the voters will take care of that problem very soon.

The modern trend and general consensus today is toward local rule or home rule, or local determination, as opposed to centralization or federalization of power and authority. The current President of the United States and his policies are at the forefront of this movement. Furthermore, it has long been considered an accepted political science principle that governmental decision ought to be made at the closest practical level to those persons affected by the decisions.

The *Boulder* decision casts a long shadow over this movement and puts local public officials in an untenable position. Almost every discretionary decision they make could conceivably be subject to review at the Federal court level, while the State and Federal Governments—those governments farest removed from the people—go about their business with immunity and impunity.

This is not right and it is not fair. This implies that we on the local scene, closest to the voters, are less capable of exercising good judgment.

Unless there is relief, the end result could be a gradual paralysis of the municipal decisionmaking process. Long, drawn-out, and expensive litigation, and possibly the exit from local government of volunteer citizen-leaders who are not willing to subject themselves to this extraordinary harrassment in the Federal courts, in addition to the usual hazards of decisionmaking. The proper arena for review of such decisions is the court of public opinion at the local level.

No level of government in this country has more restraints placed on it than local government. We are subject to regulations and review from the legislative, executive, and judicial branches of the State government and increasingly from the Federal Government; and we are imminently and quite appropriately subject to review from the people we serve.

Much of the review from State and Federal levels is reasonable and practical, but enough is enough. The line should be drawn when we have to live in fear of a Federal court suit if we decide to paint one curb yellow and leave another unmarked, or approve one rezoning proposal and disapprove another.

I am not a legal scholar and I do not propose to lay before you a detailed solution. I do strongly propose, however, that with the monumental and pervasive restraints already in place on local government, whatever immunity is good for State and Federal Governments is good, and justifiable, for local governments insofar as this immunity relates to the kinds of basic services and functions traditionally rendered at the municipal level.

The CHAIRMAN. Thank you very much. We are very pleased to have you with us.

I have a few questions here that I would like to ask.

I know that each of you are greatly concerned with the prospect of having to pay antitrust treble damages from the public treasury. Would you support any proposal that limited recovery to single damages or perhaps simply injunctive relief?

Mayor FREEMAN. Why should there be any damages?

The CHAIRMAN. That's the question I'm asking you to express yourself on.

Mayor STALLINGS. I would be glad to make a comment on this one. It wouldn't be the total answer to our problem but that would be a stop along the way.

Mayor DODDS. I'm not sure many situations occur and if our State could stand our practice.

The CHAIRMAN. How about injunctive relief?

Mayor FREEMAN. If you could actually prove the payments.

The CHAIRMAN. Any other answers?

Mayor FINLAY. In a sense it looks like the type of service you are talking about, if it's a defined urban service, and I mean every person can agree, but I think such as you know a city's right to pick up garbage or the impact of cable TV or those types of services. I just don't think the antitrust law is problem to regulate the conduct of a local government in that area of urban service. There are laws on the book that take care of that and there are other laws that are applicable that regulate, you know, most of what we do in providing water and sewer services. It's just an existing amount of legislation that tends to pretty well show them in the

areas in which a legal government can back but in these type urban services that I think I have elluded to and I think we're concerned with the antitrust law is just about the vehicle in which the improvements or result the Congress wants. I think that's the point we're making.

The CHAIRMAN. Along these same lines, Justice Rehnquist said in the *Boulder* dissent that it will be extremely difficult for courts to exempt municipalities and their officials from treble damage liability. Do you agree with his conclusion?

Mayor STALLINGS. I don't know exactly why he would feel that way but I think with the political wisdom and the legal wisdom visible in this country, there certainly could be drawn something that would address this problem. We ought not to be subject to this sort of problem on the way to render these services. People have to have these services in order to live.

Mayor DODDS. We have to have some protection from this antitrust law. It is basically on behalf of the citizens who pay the bills and try to give them the most for that service. Why should we be discriminated against? Why not the State agencies. The bottom line is, Senator, we simply can't afford it.

The CHAIRMAN. As a practical matter, how difficult do you think it would be for cities to obtain the necessary State permission to regulate in an anticompetitive fashion where necessary?

Mayor FINLAY. I feel that the remedy lies in the Federal legislative and executive levels.

Mayor FREEMAN. It would almost be impossible for local government. Twenty two attorneys filed against the decision in *Boulder*. We could never afford that. Our citizens would take to the well. I'd hate to tell you what they'd do.

Mayor FINLAY. The citizens in this country have a reason for existing. There are certain problems that a community has. There are certain services that have an impact on all of the citizens. Such as, too many billboards, too many cable TV wires hanging out. We don't and will not have that money to spend.

The CHAIRMAN. Another suggested solution to this problem is legislation which would grant cities antitrust immunity when home rule is in effect. Would you favor that approach?

Mayor FREEMAN. Since all the cities have home group, yes.

The CHAIRMAN. When the Judiciary Committee conducted a hearing on *Boulder* recently in Washington, the Justice Department asserted that "consumers, businesses, and local government entities could be the victims of anticompetitive conduct undertaken by other jurisdictions, and designed to provide an advantage to their citizens at the expense of their neighbors, if municipalities were free to violate the antitrust laws in the absence of a statewide policy." How do you respond to this charge?

Mayor STALLINGS. The U.S. Government regulated the conduct from the beginning of time. I mean, there's always been a certain limit of what one does, when Government does something, and other decision, that have been made by the Congress. I mean I don't think you can decide that.

The CHAIRMAN. If State authorization were not required for municipalities to engage in actions that are anticompetitive, what

recourse, if any, do you believe the State might have if it did not approve the municipal actions?

Mayor FREEMAN. I would suggest their own antitrust laws and criminal laws.

The CHAIRMAN. Well, I think that completes the panel work here unless you have something else you wish to say. Again, we thank you for your presence and for your testimony, and I'm sure it will be helpful to us. You are excused.

[The prepared statements of Mayors Dodds, Freeman, Finlay, and Stallings follow:]

STATEMENT
BY
MAYOR JOHN J. DODDS, JR.
OF THE TOWN OF MOUNT PLEASANT
ON BEHALF OF
THE MUNICIPAL ASSOCIATION OF SOUTH CAROLINA

SENATOR THURMOND:

I AM JOHN J. DODDS, JR., MAYOR OF MOUNT PLEASANT AND PRESIDENT OF THE MUNICIPAL ASSOCIATION OF SOUTH CAROLINA. I WANT TO THANK YOU PERSONALLY AND ON BEHALF OF THE MEMBERSHIP OF THE MUNICIPAL ASSOCIATION FOR ARRANGING YOUR BUSY SCHEDULE TO RECEIVE TESTIMONY FROM LOCAL GOVERNMENT OFFICIALS ON THE IMPACT ON STATE AND LOCAL GOVERNMENTS OF THE U. S. SUPREME COURT'S DECISION IN COMMUNITY COMMUNICATIONS CO. v. CITY OF BOULDER.

ALTHOUGH I AM NOT A LAWYER, IT IS CLEAR TO ME AS ONE INVOLVED IN THE DAILY OPERATIONS OF A TOWN GOVERNMENT, THAT THE SUPREME COURT'S ACTION IN THE BOULDER CASE CREATES MANY PROBLEMS FOR CITY, COUNTY AND STATE GOVERNMENTS. THE MUNICIPAL ASSOCIATION BELIEVES THAT FEDERAL LEGISLATION GRANTING A LOCAL GOVERNMENT EXEMPTION FROM ANTITRUST LIABILITY IS THE MOST FEASIBLE SOLUTION TO THE UNCERTAINTIES AND PROBLEMS CREATED BY THE BOULDER DECISION.

AS YOU KNOW, SENATOR, SOUTH CAROLINA IS A STATE COMPOSED OF RELATIVELY SMALL MUNICIPALITIES IN COMPARISON TO THE POPULATIONS OF MUNICIPALITIES IN NEIGHBORING STATES. THERE ARE 268 INCORPORATED MUNICIPALITIES IN SOUTH CAROLINA: 190 HAVE A POPULATION OF LESS THAN 3,000; ONLY 8 HAVE A POPULATION OF 25,000 OR MORE; AND OUR LARGEST MUNICIPALITY HAS A POPULATION OF APPROXIMATELY 100,000 PEOPLE. REGARDLESS OF THE POPULATION SIZE OF A PARTICULAR MUNICIPALITY, ALL DERIVE THEIR POWERS AND AUTHORITY TO PROVIDE SERVICES FROM GENERAL STATUTORY LAW ENACTED BY THE GENERAL ASSEMBLY. THE HOME RULE ACT OF 1975 ADOPTED PURSUANT TO A CHANGE IN THE STATE CONSTITUTION IN A SENSE FREED LOCAL GOVERNMENTS FROM LEGISLATIVE DOMINANCE IN

ADMINISTERING LOCAL AFFAIRS AND CONFERRED UPON MUNICIPALITIES A GREATER DEGREE OF LOCAL SELF-GOVERNMENT. AFTER READING THE OPINION, I AM IN FULL AGREEMENT WITH JUSTICE REHNQUIST WHEN HE PREDICTED IN THE DISSENTING OPINION THAT:

> "BY TREATING THE MUNICIPAL DEFENDANT AS NO DIFFERENT FROM THE PRIVATE LITIGANT ATTEMPTING, TO INVOKE THE PARKER DOCTRINE, THE COURT'S DECISION TODAY WILL RADICALLY ALTER THE RELATIONSHIP BETWEEN THE STATES AND THEIR POLITICAL SUBDIVISIONS, MUNICIPALITIES WILL NO LONGER BE ABLE TO REGULATE THE LOCAL ECONOMY WITHOUT THE IMPRIMATUR OF A CLEARLY EXPRESSED STATE POLICY TO DISPLACE COMPETITION. THE DECISION TODAY EFFECTIVELY DESTROYS THE 'HOME RULE' MOVEMENT IN THIS COUNTRY, THROUGH WHICH LOCAL GOVERNMENTS HAVE OBTAINED, NOT WITHOUT PERSISTENT STATE OPPOSITION, A LIMITED AUTONOMY OVER MATTERS OF LOCAL CONCERN."

I HAVE BEEN ADVISED THAT MANY OF THE STATUTORY GRANTS OF POWER AUTHORIZING A MUNICIPALITY TO PERFORM CERTAIN ROUTINE FUNCTIONS MAY NOT MEET THE SUPREME COURT'S STANDARD, AND, THEREFORE WHEN WE, AS MUNICIPAL OFFICIALS ACT, WE MAY BE EXPOSING OURSELVES AND OUR MUNICIPALITIES TO ANTITRUST LIABILITY. AS AN ILLUSTRATION, SOUTH CAROLINA'S HOME RULE ACT AUTHORIZES MUNICIPALITIES TO "GRANT FRANCHISES FOR THE USE OF PUBLIC STREETS AND MAKE CHARGES THEREFOR," TO "LEVY A BUSINESS LICENSE TAX ON GROSS INCOME" AND "TO ENACT REGULATIONS, RESOLUTIONS AND ORDINANCES, NOT INCONSISTENT WITH THE CONSTITUTION AND GENERAL LAW OF THIS STATE". AS I UNDERSTAND IT, IN ORDER FOR A MUNICIPALITY TO BE EXEMPT FROM ANTITRUST SCRUTINY, ITS ACTION MUST BE "IN FURTHERANCE OR IMPLEMENTATION OF CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY", THAT IS, PURSUANT TO SPECIFIC, DETAILED STATE LEGISLATION COVERING SPECIFIED ACTIVITES. FURTHER, IT APPEARS THAT THE STATE MUST "ACTIVELY SUPERVISE" THE POTENTIALLY ANTICOMPETITIVE ACTIONS TAKEN BY LOCAL

GOVERNMENT. IT IS HIGHLY QUESTIONABLE WHETHER THE BLANKET STATUTORY GRANTS OF POWER, CITED ABOVE AS ILLUSTRATIONS, WOULD SATISFY THE COURT'S GUIDELINES. ZONING AND LAND USE REGULATIONS ALONG WITH DEVELOPMENT PROJECTS INVOLVING JOINT EFFORTS BY LOCAL GOVERNMENT AND PRIVATE ENTERPRISE ARE OTHER AREAS OF CONCERN.

DISGRUNTLED INDIVIDUALS AND BUSINESSES NOW HAVE A NEW AND POWERFUL WEAPON TO USE AGAINST LOCAL GOVERNMENT. IF A PLAINTIFF CAN MEET THE REQUIREMENTS OF THE FEDERAL ANTITRUST STATUTES, LOCAL TAXPAYERS WILL BE FORCED TO PAY TREPLE DAMAGE AWARDS, PLAINTIFF'S ATTORNEY'S FEES AND COURT COSTS. EVEN IF A MUNICIPALITY MAINTAINS A SUCCESSFUL DEFENSE, THE COST TO THE PUBLIC FOR LEGAL FEES AND EXPENSES WILL SEVERELY STRAIN, IF NOT BREAK, MUNICIPAL TREASURIES. AS I MENTIONED EARLIER, SOUTH CAROLINA IS A STATE OF SMALL TOWNS AND WE WOULD HAVE GREAT DIFFICULTY IN FINDING, LET ALONE PAYING, ANTITRUST LAWYERS TO PREPARE AND LITIGATE ANTITRUST CASES. JUST THE THREAT OF A LAWSUIT CAN BE A POWERFUL INTIMIDATING FORCE WHICH MAY CAUSE LOCAL GOVERNMENT OFFICIALS TO DELAY OR CANCEL NEEDED PUBLIC PROJECTS AND PROGRAMS.

IN 1973 THE PEOPLE OF SOUTH CAROLINA VOTED TO GIVE THEMSELVES "HOME RULE" LOCAL GOVERNMENTS SO THAT THEY COULD BETTER SHAPE AND FASHION THE SERVICES THAT THEY WANTED THOSE GOVERNMENTS TO PROVIDE. IN 1982, THE UNITED STATES SUPREME COURT NULLIFIED THEIR VOTE. THE BOULDER DECISION DENIES THE PEOPLE OF THIS STATE THE MOST BASIC RIGHT TO DECIDE FOR THEMSELVES WHAT IS BEST FOR THEIR COMMUNITY. IT RESTRICTS THE ABILITY OF LOCAL GOVERNMENT TO EXPERIMENT IN DESIGNING PUBLIC SERVICE DELIVERY SYSTEMS TO MEET THE NEEDS OF SOUTH CAROLINA'S EXPANDING POPULATION AND CHANGING ECONOMY.

IN CLOSING, THE MUNICIPAL ASSOCIATION OF SOUTH CAROLINA WOULD URGE CONGRESS TO ADOPT CORRECTIVE LEGISLATION TO PROVIDE LOCAL GOVERNMENTS, AS POLITICAL SUBDIVISIONS OF THE STATE, WITH THE SAME PROTECTION FROM ANTITRUST LIABILITY AS AFFORDED THE STATES.

STATEMENT BY MAYOR CORINNE FREEMAN

Senator Thurmond and members of the Committee staff, I am Corinne Freeman, Mayor of St. Petersburg, Florida, and serve as first Vice-President of the Florida League of Cities. We of the League appreciate your invitation to appear here and present testimony on the need for federal legislation to alleviate the impact on the cities of the United States as a result of the *City of Boulder, Colorado* decision by the U.S. Supreme Court.

When the Executive Director of our League called asking me to represent the Florida League here, I accepted with trepidation, as I know very little about the antitrust laws. However, I do have some knowledge about being mayor of a city, and I believe that a law which could subject my city to treble damages and attorneys' fees would be devastating and result in an inordinate and unfair burden on the taxpayers of my community.

I am advised that in the *City of Lafayette* case, preceding the *Boulder* decision, respondents sought treble damages in excess of $540 million. If divided among the cities' residents, that penalty would have exceeded $28,001 for each family of four. Because of these devastating possibilities, William Baxter, of the Administration's Antitrust Division in the Department of Justice, considers antitrust cases against cities a "serious threat to the political structures of the states". Even though the Administration has "not reached a conclusion about a solution", it is watching all aspects of this matter very closely. The cases that have made municipal antitrust liability an issue, Baxter said, all "involve unsound application of the antitrust laws and overly rigid Supreme Court rulings about vertical combinations".

My presentation is partially based on our understanding of the philosophy of Federalism as it relates to local government. With me, also representing the League, is Frank B. Gummey, III, City Attorney of Daytona Beach, and Chairman of the Steering Committee of the Florida Municipal Attorneys' Association, who will make some brief remarks on the legal aspects of the *Boulder* decision. Also present is Claude L. Mullis, League Counsel, who is here to help me out if I get into legal waters that are too deep.

I, along with many others, believe in the right of local government to self-govern in the provision of services to its citizens. In Florida, similar to Colorado, our cities possess constitutional "home rule" powers. We fought long and hard for these powers, which were only granted by our newly-revised 1968 Constitution, and we would be very reluctant to return to conditions which existed prior to the enactment of our constitutional home rule powers; that is, when our cities could only exercise those powers specifically granted by the Legislature and necessarily inferred therefrom. Further, it is likely that a new wave of legislative "local bills" will cloak some cities with state-shared immunity, while others will await more favorable legislators.

The Supreme Court in *Boulder* held that only the state was immune from the Sherman and Clayton Antitrust Acts, and, therefore, in order for a municipality to be immune, it must be performing an act under authority mandating a "clearly articulated and affirmatively expressed policy of the state". Federal legislation exempting all local governments from the antitrust laws appears to be the only logical cure for this problem. It would be far better for Congress to establish a uniform exemption, as these statutes were enacted by the U.S. Congress, and this would eliminate disparate treatment of the antitrust laws from state to state and city to city. This would also prevent congesting our federal courts more than they are today, because any time a state adopts a "clearly articulated state policy", it would be left to the federal court to determine the sufficiency of that state's expression and immunization of that state's anti-competitive policy.

We certainly don't want to give the impression that elected officials should be granted immunity when they commit an act of conspiracy against private industry or individuals. But we understand that most states, if not all, make conspiracy a criminal offense, and therefore it should be the individual official who is punished, and not the taxpayers of the local government, by the court's awarding treble damages against the city, particularly since the conspiracy was illegal in the first place. Also, we understand all states, except Georgia, have on the statute books their own antitrust laws.

We do not believe the Congress ever intended the Sherman and Clayton Antitrust Acts to be applicable to local governments, and we understand the courts had so held until recently.

Therefore, Senator, on behalf of the cities of Florida, we urge you and the Senate Judiciary Committee, which you chair, to develop, and Congress to enact into law, an amendment to the Sherman Act and the Clayton Act, exempting all municipal governments from the provisions thereof.

Thank you again for this opportunity to appear before you in the State House of the Great State of South Carolina.

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STATEMENT OF
THE HONORABLE KIRKMAN FINLAY, JR.
MAYOR OF COLUMBIA, SOUTH CAROLINA

MR. CHAIRMAN:

THANK YOU FOR THIS OPPORTUNITY TO SPEAK TO YOU ON A MATTER THAT HAS OMINOUS IMPLICATIONS FOR LOCAL GOVERNMENT IN SOUTH CAROLINA.

WHILE MANY UNCERTAINTIES EXIST, THERE CAN BE LITTLE DOUBT THAT THE SUPREME COURT'S DECISION IN THE BOULDER CASE, IF PERMITTED TO STAND, WILL CAUSE A RESTRUCTURING OF STATE AND LOCAL GOVERNMENT RELATIONSHIPS NOT ONLY IN OUR STATE BUT IN EVERY STATE OF THE NATION.

IN 1973 THE PEOPLE OF SOUTH CAROLINA APPROVED A REVISED ARTICLE VIII TO THE STATE CONSTITUTION DEALING WITH LOCAL GOVERNMENT. PURSUANT TO THE MANDATE OF §9 OF ARTICLE VIII, THE GENERAL ASSEMBLY IN 1975 PASSED WHAT IS POPULARLY KNOWN AS THE HOME RULE ACT, AND, BY SO DOING, USHERED IN STAUTORY HOME RULE FOR SOUTH CAROLINA MUNICIPALITIES. WHAT IS NOW CODIFIED AS §5-7-30 IS THE GENERAL POWERS GRANT CONFERRED UPON ALL MUNICIPALITIES REGARDLESS OF SIZE. THIS SECTION PROVIDES, AMONG OTHER THINGS, THAT "ALL MUNICIPALITIES OF THIS STATE SHALL... HAVE AUTHORITY TO ENACT REGULATIONS, RESOLUTIONS AND ORDINANCES... INCLUDING THE EXERCISE OF SUCH POWERS IN RELATION TO ROADS, STREETS, MARKETS, LAW ENFORCEMENT, HEALTH AND ORDER IN SUCH MUNICIPALITIES OR RESPECTING ANY SUBJECT AS SHALL APPEAR TO THEM NECESSARY AND PROPER FOR THE SECURITY, GENERAL WELFARE AND CONVENIENCE OF SUCH MUNICIPALITIES OR FOR PRESERVING HEALTH, PEACE, ORDER AND GOOD GOVERNMENT THEREIN..." TO BE SURE THAT THE INTENT OF THE PEOPLE WAS NOT MISINTERPRETED, THE FRAMERS OF ARTICLE VIII AND THE MEMBERS OF THE GENERAL ASSEMBLY INCLUDED ADDITIONAL PROVISIONS WHICH MAKE IT CLEAR THAT, "THE POWERS OF A MUNICIPALITY SHALL BE LIBERALLY CONSTRUED IN FAVOR OF THE MUNICIPALITY AND THE SPECIFIC MENTION OF PARTICULAR POWERS SHALL NOT BE CONSTRUED AS LIMITING IN ANY MANNER THE GENERAL POWERS OF SUCH MUNICIPALITIES." ARTICLE VIII, §17 OF THE S. C.

CONSTITUTION AND S. C. CODE §5-7-10. SIMILIAR PROVISIONS WERE WRITTEN FOR COUNTY GOVERNMENT.

IT HAS TAKEN YEARS OF CONCENTRATED EFFORT ON THE PART OF MANY INVOLVED PEOPLE TO MOVE THE LOCAL DECISION MAKING POWER AWAY FROM THE STATE CAPITOL AND TO THE TOWN HALLS AND COUNTY SEATS WHERE IT PROPERLY BELONGS. BY THEIR HOLDING THAT THE "STATE ACTION EXEMPTION" DOES NOT EXTEND TO THE POLITICAL SUBDIVISIONS OF A STATE UNLESS THE LOCAL GOVERNMENT ACTION CONSTITUTES "EITHER THE ACTION OF THE STATE ITSELF OR MUNICIPAL ACTION IN FURTHERANCE OR IMPLEMENTATION OF CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY," THE FIVE MEMBER MAJORITY OF THE SUPREME COURT REVERSED THE TREND TOWARD HOME RULE. NOT ONLY HAS THE TREND BEEN REVERSED BUT IT WOULD BE A FAIR STATEMENT TO SAY THAT THE TRADITIONAL SHARING OF THE RESPONSIBLITY FOR THE EXERCISE OF GENERAL POLICE POWERS BETWEEN THE STATE GOVERNMENT AND ITS POLITICAL SUBDIVISIONS MUST BE REFASHIONED TO COMPORT WITH THE SUPREME COURT'S IDEA OF A "DUEL SYSTEM OF GOVERNMENT". IT CAUSES ME GREAT CONCERN TO SEE THE FEDERAL COURTS INAPPROPRIATELY INTERFERING WITH THE RELATIONSHIP BETWEEN THE STATES AND THEIR POLITICAL SUBDIVISIONS UNDER THE GUISE OF FEDERAL ANTITRUST LAWS. THE ARBITRARY DISTINCTION DRAWN BY THE COURT BETWEEN THE STATE AND ITS POLITICAL SUBDIVISIONS MOCKS THE TENTH AMENDMENT UPON WHICH THE "STATE ACTION EXEMPTION" IS BASED. WITHOUT THE USE OF THEIR POLITICAL SUBDIVISIONS TO ASSIST IN THE EXERCISE OF "POWERS RESERVED TO THE STATES", THE STATE GOVERNMENTS WOULD HAVE AN IMPOSSIBLE TASK EXERCISING THEIR POWERS TO PRESERVE AND TO PROMOTE THE GENERAL WELFARE OF THEIR PEOPLE. THE SUPREME COURT'S ACTION IS A MISGUIDED USE OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION TO INVADE THE TENTH AMENDMENT POWERS OF THE STATES. BY TREATING LOCAL GOVERNMENTS AS PRIVATE ENTERPRISE BUSINESS CORPORATIONS, THE COURT HAS CRIPPLED THE ABILITY OF THE STATE TO GOVERN IN THE BEST INTERESTS OF ITS PEOPLE.

THE COURT WENT NO FURTHER THAN TO SAY THAT LOCAL GOVERNMENTS ARE NOW SUBJECT TO POSSIBLE LIABILITY UNDER FEDERAL ANTiTRUST

LAWS WHEN THEY ENGAGE IN THE EXERCISE OF POWERS WHICH MAY TEND TO RESTRICT COMPETITION. MUNICIPALITIES AND OTHER UNITS OF LOCAL GOVERNMENT MUST NOW LOOK TO A SPECIFIC STATE STATUTE TO FIND SANCTION FOR MANY ACTIONS THEY NOW ROUTINELY TAKE.

TO REMEDY THIS INTOLERABLE SITUATION, THERE ARE THREE POSSIBLE COURSES OF ACTION. FIRST, AND LEAST DESIRABLE, WOULD BE TO LET THE FEDERAL COURTS THROUGH CASE BY CASE LITIGATION DEVELOP A BODY OF LAW DEFINING THE PARAMETERS OF BOULDER. IN THE MEANTIME, THE LOCAL GOVERNMENT DECISION MAKING MACHINERY WOULD BE PARALYZED AND LOCAL GOVERNMENT TREASURIES WOULD BE DRAINED.

THE SECOND ALTERNATIVE WOULD BE TO LET THE FIFTY STATE LEGISLATURES BEGIN THE PROCESS OF INSULATING THEIR POLITICAL SUBDIVISIONS FROM ANTITRUST LIABILITY BY "CLEARLY ARTICULATING" STATE POLICY AUTHORIZING ANTICOMPETITIVE ACTIONS BY LOCAL GOVERNMENTS. THIS IS NOT A FEASIBLE SOLUTION SINCE THE LEGISLATURES WOULD BE PUT IN A POSITION OF SECOND GUESSING FEDERAL JUDGES AS TO WHAT WOULD CONSTITUTE A SUFFICIENT STATEMENT TO INSULATE THEIR POLITICAL SUBDIVISIONS. I WOULD POINT OUT THAT THE MANDATE EXPRESSED IN THE REVISED ARTICLE VIII OF THE SOUTH CAROLINA CONSTITUTION FOR THE GENERAL ASSEMBLY TO ENACT LEGISLATION AUTHORIZING CONSOLIDATION OF CITIES AND COUNTIES IS NOW TEN YEARS OLD AND THE GENERAL ASSEMBLY STILL HAS NOT ACTED.

IT IS MY BELIEF THAT NEITHER FEDERAL LITIGATION NOR STATE LEGISLATION WILL EFFECTIVELY RESOLVE THE PROBLEM CREATED BY BOULDER. SINCE IT IS A MATTER OF FEDERAL ANTITRUST LAW AND INVOLVES BASIC CONCEPTS OF FEDERALISM, I WOULD URGE THE PASSAGE OF FEDERAL LEGISLATION TO AMEND THE ANTITRUST LAWS TO PROVIDE AN EXEMPTION FOR LOCAL GOVERNMENTS. IF IT IS CLEARLY STATED THAT LOCAL GOVERNMENTS ARE TO BE EXEMPT WHEN REGULATING FOR THE WELFARE OF ITS CITIZENS, LOCAL GOVERNMENT CAN CONTINUE TO PERFORM ITS ROLE IN THE FEDERAL SYSTEM.

Tracy Stallings, Mayor, City of Carrollton, Georgia

I serve as Mayor of the City of Carrollton, Georgia, a town of about 15,000 population situated approximately fifty miles southwest of Atlanta. We have a Mayor-Council-City Manager form of government, with the Mayor and four-member Council establishing policy and guidelines and the City Manager and other professional staff implementing this policy and managing the provision of basic services on a day-to-day basis.

My vocation is education; I serve on the administrative staff of a public senior college located in Carrollton. Three members of the City Council are businessmen and one is a medical doctor. We meet twice monthly and other times as needed, and as Mayor I communicate with the City Manager virtually on a daily basis. Compensation for the Mayor and Council is nominal. Our chief motivation for serving in these positions is the rendering of a civic service, not the building of political careers or the earning of a living.

This, of course, is not an unusual circumstance--and that is just my point. It's a situation not unlike that in hundreds of municipalities across the country, where men and women in local leadership roles strive to make common sense decisions in behalf of their fellow citizens with the objective of improving and protecting the general health, welfare, and safety of the affected constituency.

Financial resources are necessarily and properly limited, and this is government where the water hits the wheel, where there is instant and continual dialogue between those who are governing and those who are governed. You do the best you can and you are immediately evaluated by your constituency.

One of the services our City renders is that of pickup and disposal of garbage. In the process of providing this basic service we have now come face to face with the problems presented by the Boulder decision. In an effort to provide garbage service in the most economical manner the City has employed a "roll-off system". This updating of our service is the basis of a suit

presently pending in our U. S. District Court wherein we are accused of antitrust violations along with violations of the civil rights of a local industrial waste hauler.

The decision to provide this service was made after numerous public hearings with input from all affected businesses and consideration to the public health and welfare of the entire City. Providing garbage service is authorized by the Georgia Constitution. The substance of this case remains to be litigated and I have every reason to believe that ultimately the alleged conspiracy and antitrust accusations will be refuted but in the interim we are faced with considerable time and expense in defending something, which, if provided by our State Government, would have carried total immunity. This suit was brought very shortly after the Supreme Court decision in Boulder. Unless some remedy is given I fear a multitude of suits steming from every discretionary decision we make in the future could be forthcoming.

I appreciate this Committee's interest in seeking a solution. I have no recommendations other than to advance my personal view that we have operated in the past for many years under what we have thought was total immunity. I hope the Committee can find a solution for a continuation of that freedom so that we may exercise our discretion and, hopefully, common sense. I do not seek an atmosphere where we are totally unanswerable but if this discretion is abused, I think the voters will take care of that problem very soon.

The modern trend and general consensus today is toward local rule or home rule, or local determination, as opposed to centralization or federalization of power and authority. The current President of the United States and his polices are at the forefront of this movement. (Furthermore, it has long been considered an accepted political science principle that governmental decisions ought to be made at the closest practical level to those persons affected by the decisions.)

The Boulder decision casts a long shadow over this movement and puts local public officials in an untenable position. Almost every discretionary decision they make could conceivably be subject to review at the federal court level, while the state and federal governments--those governments fartherest removed from the people--go about their business with immunity and impunity.

This is not right and it is not fair. This implies that we on the local scene, closest to the voters, are less capable of exercising good judgment.

Unless there is relief, the end result could be a gradual paralysis of the municipal decision-making process, long, drawn-out, and expensive litigation, and possibly the exit from local government of volunteer citizen-leaders who are not willing to subject themselves to this extraordinary harrassment in the federal courts, in addition to the usual hazards of decision making. The proper arena for review of such decisions is the court of public opinion at the local level.

No level of government in this country has more restraints placed on it than local government. We are subject to regulations and review from the legislative, executive, and judicial branches of the state government and increasingly from the federal government; and we are imminently and quite appropriately subject to review from the people we serve.

Much of the review from state and federal levels is reasonable and practical, but enough is enough. The line should be drawn when we have to live in fear of a federal court suit if we decide to paint one curb yellow and leave another unmarked, or approve one rezoning proposal and disapprove another.

I am not a legal scholar and I do not propose to lay before you a detailed solution. I do strongly propose, however, that with the monumental and pervasive restrints already in place on local government, whatever immunity is good for state and federal governments is good, and justifiable, for local governments insofar as this immunity relates to the kinds of basic services and functions traditionally rendered at the municipal level.

The CHAIRMAN. Our next panel will consist of Roy D. Bates, city attorney, Columbia, S.C., representing the South Carolina Municipal Attorneys Association; Frank B. Gummey III, city attorney, Daytona Beach, Fla., representing the Florida League of Cities, Inc.; and Henry W. Underhill, Jr., city attorney, Charlotte, N.C., representing the North Carolina League of Municipalities.

First is Mr. Roy Bates, city attorney, Columbia, S.C.

STATEMENT OF ROY D. BATES, CITY ATTORNEY, COLUMBIA, REPRESENTING SOUTH CAROLINA MUNICIPAL ATTORNEYS ASSOCIATION

Mr. BATES. I appreciate the opportunity to bring to your attention some of the concerns of the city attorneys of South Carolina about the impact of the decision in the *Boulder* case.

In the 1970's many of us assisted in the framing of laws to implement the home rule amendment to the State constitution. These laws have served the people of this State well up to this point. However, we are no longer able to give to our city councils opinions that the ordinances which have been adopted to carry out the intent of the general assembly that the people have a greater voice in local government will not subject the public treasury to depletion through the application of Federal laws designed to penalize private sector unfair practices.

The Supreme Court has ignored some basic facts in its analysis of the nature of State and local governments. The same people who adopt the State constitution also elect legislators at the State and local level to pass laws to carry out the objectives of that constitution. With the advent of single member districts in the general assembly, some members of that body are elected by fewer constituents than are the members of some city councils.

The Supreme Court apparently has equated "State with "State legislature." We submit that "State" means "people of the State" acting either through their constitution or their elected representatives at any level of government within the framework of their constitution. The pronouncement that in our system of government there is "no place for sovereign cities" articulated in the *Boulder* decision demonstrates the confusion. The sovereign power of the State is exercised by its people. The Court has said, in effect, that the people of a State cannot decide by constitutional provision to regulate the use of public streets through local elected officials or the local taxpayers who must pay the costs of maintaining those streets, lest those same local taxpayers be required to pay a private businessman who contends that he has been restrainedd from conducting his business on public property. This reasoning produces an impasse in South Carolina, just as it does in Colorado, in addition to making a mockery of the 10th amendment as pointed out by Mayor Finlay. The South Carolinia constitution for more than 85 years has contained a provision (now article VIII, section 15) which prohibits the legislature from granting franchises in streets within a municipality without the consent of the city council, thereby reserving regulation of streets to local governing bodies. The use of public streets for conduct of private business is not a matter of right, but a privilege subject to franchise. City council may grant a

nonexclusive franchise by ordinance. An exclusive franchise may be granted only upon approval by city voters in a referendum.

There can be no greater restraint on competition than the granting of an exclusive franchise. If the voters of a city, not those of the entire State, approve such an exclusive franchise it could be asserted that those voters had subjected the city to suit for violation of the antitrust laws. The State legislature cannot speak for the State in such a case. Does the *Boulder* decision mean that a statewide referendum on a purely local matter would be the only protection against an antitrust suit? There are also private risks in such cases.

I will not attempt to list the areas of possible application of this decision for fear of being repetitious. Examples of problems are legion and the potential for increase in load on Federal courts is obvious. The principles of federalism suffer erosion.

The alternatives have been noted. A great deal of material has been furnished the committee by Nimlo, the National Organization of City Attorneys, and we endorse the plea of that organization for legislative action. We believe that anything short of absolute immunity will only compound the uncertainties created by *Boulder.* This State has never recognized a distinction between proprietary and governmental functions of local governments. Federal recognition of such a distinction is undesirable. The preemption approach suggested by the dissent in *Boulder* leads to more litigation. To expect the courts or State legislatures to solve the problems is wishful thinking.

Local governmental regulation is a constant process of balancing public against private interests. No better vehicle for properly balancing those interests has been found than the elected officials closest to the people affected.

We urge clear resolution of the confusion by amendment establishing antitrust immunity for all levels of local government.

Than you.

The CHAIRMAN. Thank you, Mr. Bates.

We will now hear from Mr. Frank B. Gummey III, representing the Florida League of Cities, Inc.

STATEMENT OF FRANK B. GUMMEY III, CITY ATTORNEY, DAYTONA BEACH, REPRESENTING FLORIDA LEAGUE OF CITIES, INC.

Mr. GUMMEY. Thank you, Senator.

I am Frank Gummey, city attorney, the city of Daytona Beach, Fla. As chairman of the Steering Committee of the Florida Municipal Attorneys' Association, I am privileged to present to your committee the association's grave concerns resulting from the *City of Boulder, Colorado* decision.

Our clients, Florida municipal governments and their citizens, have had their future ability to effectively and economically provide vital services severely impaired by new and uncertain Federal antitrust exposure chilling and limiting the municipal decision-making process.

Both the Sherman and Clayton Antitrust Acts have generally served our country very well in protecting our citizenry from unrestrained economic avarice which can destroy competitive com-

merce. However, it goes almost without saying that our municipal governments in this land have done a generally successful job in providing for the health, safety, and welfare of their citizens. In that process, we in government, whether at the Federal, State or local level, have also recognized that there are instances when unrestrained competition can result in injury to our citizens; unfortunately, often to those citizens least able to protect themselves.

Before I mention some of the evils caused by the *Boulder* decision that I believe the Congress should and can correct, let me comment that this drastic policy shift embodied in the decision has been made in the absence of any compelling evidence of fault in the status of the law prior to *Boulder.* Put simply: if it wasn't broke, why did the Supreme Court need to fix it?

Probably the greatest evil caused by local government's new and emerging exposure to antitrust liability is the chilling effect it has had and will continue to have on the decisionmaking process. Within the last month, I have had to advise my city commission to end decades old relationships with our local Jaycees and a high school band parents' association, despite the unanimous conviction of our elected officials that those relationships were in the best interest of our city. To expect local elected officials to decisively exercise the police powers of a municipality in an atmosphere where their attorneys can only tell them that antitrust exposure will be defined through an accumulation of several years court decisions is asking the impossible. Unfortunately, local governments will frequently avoid providing necessary and desirable services to their citizens to escape the litigation quagmire that antitrust lawsuits bring.

At a recent siminar, a member of the plaintiff's antitrust bar described the *Boulder* decision as the antitrust lawyers relief act. It appears that the only identified gain of the decision is that a whole new field of litigation with almost guaranteed fees, has been opened up for these attorneys. For instance, the city of Pensacola has paid approximately $50,000 of the taxpayers' money for its specially retained antitrust counsel to successfully defend it in the U.S. district and circuit courts against antitrust litigation brought by another antitrust law firm. Despite the fact that this lawsuit affected one small part of all the city's operations, it cost Pensacola more than their city attorney cost them for an entire year. Its citizenry got not one single benefit out of the expenditure.

Possibly the most frustrating aspect of the *Boulder* decision is the harm it causes to the home rule movement in this country. In this century we have seen local governments evolve from being minor functionaries of the State to vital, self-reliant providers of locally desired services. Cities have truly become the laboratories for developing innovative, successful methods for meeting citizen needs. For cities now to return to their State capitals to lobby for regimented programs dictated on a statewide basis will no more solve the infinite variety of municipal problems than Federal mandates have. State legislative provisions providing antitrust immunity would probably do more harm than good.

What then is the solution? Logically, the best cure to difficulties created by Federal legislation is to amend that legislation. If Congress where to extend to local government the degree of immunity

enjoyed by the Federal and State Governments, we in local government could then get on with the job of promoting our citizens health, safety, and welfare. It is best remembered that such immunity frees municipalities of antitrust scrutiny only if they adopt a clearly articulated and affirmatively expressed policy to replace competition and if they actively supervise such policies.

Local governments and the people who serve in them are not enemies of America's great free enterprise system. In fact, most cities' leadership are primarily employed in that system and serve their governments on a part-time basis. Thus, those leaders and the citizenry who elect them have and will continue to guard against unnecessary displacement of competition much more effectively, sensibly, and rapidly than the Federal court system, often distanced by geography and experience from the local problem at hand.

On behalf of the Florida Municipal Attorneys' Association, I thank you, Mr. Chairman, for your kind attention and gracious South Carolina hospitality.

The CHAIRMAN. Thank you.

Mr. Underhill, you are next.

STATEMENT OF HENRY W. UNDERHILL, JR., CITY ATTORNEY, CHARLOTTE, REPRESENTING NORTH CAROLINA LEAGUE OF MUNICIPALITIES

Mr. UNDERHILL. Mr. Chairman and members of the committee, I am Henry W. Underhill, Jr., city attorney of Charlotte, N.C., appearing on behalf of the North Carolina League of Municipalities as the municipal official from the State of North Carolina designated by the league to offer testimony at this hearing. I also currently serve as first vice president of the National Institute of Municipal Law Officers, and although I do not appear in an official capacity as a representative of that organization, I believe the opinions that I will express this morning are consistent with the position taken by the National Institute of Municipal Law Officers at a previous hearing held by this committee in Washington, D.C., on June 30, 1982. The purpose of my appearance before this committee is to briefly present the views of North Carolina municipal officials on the potential ramifications of the now famous *Boulder* decision and to request the committee's assistance in fashioning a legislative remedy for local governments to rectify the disturbing developments stemming from the *Boulder* case and earlier Supreme Court decisions on the subject.

The facts and the decisions reached in the *Boulder* case and its antecedents are well-known to this honorable committee and thus I will not dwell upon them in my testimony. I feel that my time would be better spent in attempting to underscore the problems caused by the uncertainty experienced by municipalities in the wake of the *Boulder* decision, and, furthermore, to stress the need for a clearly stated national policy formulated by the Congress.

The ruling in the *Boulder* case now makes local governments the targets of antitrust litigation for virtually the entire range of local government activities including, but not limited to, procurement, garbage collection and disposal, water and sewer rate setting, elec-

trical systems, zoning and land use, as well as franchising and licensing of all types such as CATV systems, taxicabs, wrecker services, and concession arrangements. In short, practically every public policy decision is now "fair game" and ripe for antitrust attack. This potential exposure is logically predictable since governmental regulations, by their very nature, tend to favor one segment of an economic community over another. City governments are inherently monopolistic in many respects because they were created to provide governmental services necessary to protect the health, safety, and welfare of their citizens. I am fearful that the primary impact of the *Boulder* decision may be to cripple effective decisionmaking on matters of public policy at the local level, because of the far reaching consequences of a subsequent successful antitrust challenge.

The majority opinion in the *Boulder* case suggests that the ruling did not "threaten the legitimate exercise of governmental power." Some legal experts and special interest groups also suggest that the furor over the *Boulder* decision is an overreaction since cities may request their State legislature to pass immunizing legislation, and hence cure the so-called problem. I do not believe this approach to be either particularly desirable or realistic. Utilizing this approach, and given the evolving development of case law in this area, the only sure way to avoid exposure under the antitrust laws is for States to assume supervisory authority over matters that have traditionally been the subject of local concern. I submit that this likely will lead to the establishment of State boards and agencies to actively review or supervise purely municipal matters thereby creating another layer of bureaucracy which I believe to be an unsatisfactory result. Furthermore, as pointed out by the testimony of Hon. Janet Gray Hayes, mayor of San Jose, Calif., before this committee on June 30, 1982, the essential issues of the coverage of the Federal antitrust laws are now going to be subject to the legislative process of each of the 50 States. Such a fragmented, piecemeal approach to a problem of this magnitude is surely undesirable, frankly quite frightening, and therefore fails to provide a reasonable solution to the dilemma that local governments now face.

I would not like to quickly turn to the potential impact of the *Boulder* decision on municipal budgets. Until about 4 years ago, in the days before the *Lafayette* ruling, city attorneys had little cause to concern themselves with antitrust analysis and hence I believe it is safe to say that municipal attorneys as a group have little or no real antitrust experience. In light of the *Lafayette* and *Boulder* decisions it is now mandatory that municipal attorneys educate themselves about the nuances of State and Federal antitrust statutes as well as learn how to litigate and competently defend antitrust suits. This necessary experience and knowledge cannot be acquired overnight.

Charlotte, N.C., the city that I represent, is the largest city in the two Carolinas, with a population slightly in excess of 300,000 persons. The city has a professional legal staff of eight attorneys, including myself, which constitutes the largest fulltime staff of municipal attorneys in the two States. Although I firmly believe that the attorneys associated with my office are exceptionally competent and capable, none of them, again including myself, have any

background or experience in antitrust law, a situation which I suspect is the rule rather than the exception.

The North Carolina League of Municipalities consists of 455 member cities and towns. Of that number, there is 1 city over 200,000 that being Charlotte; 7 cities between 50,000 and 200,000; 62 municipalities between 5,000 and 50,000 and 385 municapilities less than 5,000 persons in population. I respectfully submit to this committee that an antitrust lawsuit brought against the average North Carolina municipality and fully litigated would be financially devastating to the community. As I have indicated, city attorneys, both in North Carolina and nationwide, rarely have sufficient antitrust backgrounds to adequately represent their municipalities in antitrust challenges, thereby requiring the municipality to retain outside counsel at considerable expense to represent its interest. Even if the municipality is successful and prevails in the litigation, attorney fees alone for their retained counsel would be a substantial and drastic on the public treasury. An even greater financial impact occurs if the municipality loses the lawsuit. If that unfortunate situation developed, the municipality would have to pay treble any damages awarded, and, by law, the plaintiff's attorney fees. The enormous expenses associated with antitrust litigation could literally financially wipe out a small community.

The likelihood that such a situation may occur is not idle speculation. Previously, this committee has received the preliminary results of a nationwide survey conducted by the National Institute of Municipal Law Officers. Of the cities reporting, at least 50 have been or presently are engaged in antitrust litigation covering the entire spectrum of municipal activity. Although I am not personally aware of any pending antitrust litigation in the State of North Carolina against local governments, I am advised by several of my city attorney colleagues that there are situations in there communities that may eventually ripen into lawsuits in the foreseeable future.

In conclusion, the *Boulder* case and its antecedents pose substantial problems for North Carolina municipalities in that it both threatens to significantly remove local control over local activites by placing such control in the hands of a State agency while causing incalculable budget problems for municipal officials. I submit that the legitimate purpose of the Federal antitrust laws is deter anticompetitive conduct and activities by private parties, not to impair the ability of municipalities to govern. In my opinion, Mr. Chairman, it is unquestionably clear that the only workable solution to the dilemma is for the Congress to adopt legislation clarifying the applicability of Federal antitrust laws to municipalities by providing cities and other municipal entities with the same status as that enjoyed by the States. Congressional action along these lines will help restore the traditional concepts of federalism and return a sense of balance to the intergovernmental structure.

Thank you.

The CHAIRMAN. Much of the mail I have received about the *Boulder* case from local government officials focuses on the uncertainties regarding the standard of liability for public defendants as well as available remedies. I am sure that the most city attorneys such as yourselves would be somewhat uneasy advising their clients

about potential antitrust liability and remedies when faced with the decision of whether to settle an antitrust suit in which the city was a defendant. Many make the argument that it would take years of litigation to resolve these questions left unanswered to *Boulder* absent a legislative response. Do you agree with this analysis?

Mr. BATES. I think any time you open a new door, lawyers by nature look to step through that door to come up with new theories. An example in this State would be, we have a statute that states that cities are liable for injuries that are caused. We still don't have all the answers to it. I think that is a real fear. It's not just the burden of having to respond to damages. It's the burden of having to litigate forever to try to find out just what our responsibilities are.

The CHAIRMAN. Some local government and antitrust experts have suggested that a possible solution to the *Boulder* case is clarifying the degree of State authorization necessary in order for local governments to be protected under the State action exemption. Do you have any thoughts on what form such an approach might take?

Mr. BATES. I don't know more clearly than that's why the Supreme Court's decision gives us great concern beyond the issue of antitrust suits. If this was admitted to be an ultimate definition of authority from the States and I don't know how it can be more clearly defined then it has been in most home rule in the States. I think it would be almost certainly difficult, perhaps not minimal task to get some uniform definition or rule of thumb that relies on the nationwide basis.

The CHAIRMAN. In situations where the States has given general authorization, such as in the operation of airports, do you believe that after *Boulder,* courts will interpret that authorization as including reasonable acts which may be inconsistent with the antitrust laws such as limiting airport taxi service?

Mr. GUMMEY. The city I represent does not operate an airport so we have some first hand experience with that. I think—I hope, rather, that the Court's going to use a rule of reason when they apply the antitrust statute. I think the problems come about from having to design an airport. I don't worry as much about the lawsuit as I do about the cost of defending.

The CHAIRMAN. Any other comments?

It is my understanding that the Supreme Court recently ruled that punitive damages were not available in section 1983 cases. Do you feel the Court is likely to follow this reasoning if it were forced to decide whether treble or single damages were available against local governments?

Mr. UNDERHILL. I hate to speak against something that hasn't been decided but I think the Antitrust Act is a little more clear than it was. They may be in a straitjacket to operate but again this is the uncertainty.

The CHAIRMAN. Some antitrust authorities have suggested that *Boulder* did not necessarily hold that local governments must meet the active State supervision requirement of *Midcal,* arguing that such requirement was meant to apply only to private parties seek-

ing State action immunity. If that analysis were correct, would this eliminate at least some of your serious concerns?

Mr. GUMMEY. I would say that it would hardly alleviate some of my concern. I don't know whether or not *Midcal* really does provide a little protection that *Boulder* seems to say is not visible.

The CHAIRMAN. Under the holding in *Boulder,* do you believe that States would have to authorize each particular governmental decision made on a local level, or do you believe that authorization of the type of State action challenged would be adequate to satisfy the standard for antitrust immunity?

Mr. BATES. I would feel a lot safer in spite of *Boulder* without anything further of having specific State authorities from the State legislature for every little thing.

The CHAIRMAN. Any further comments?

Well, I think that completes the questions I have. I want to thank you, gentlemen, for your appearance here today. Thank you very much.

[The prepared statements of Messers. Bates, Gummey, and Underhill follow:]

STATEMENT OF

ROY D. BATES
CITY ATTORNEY, COLUMBIA, SOUTH CAROLINA

Mr. Chairman:

I appreciate the opportunity to bring to your attention some of the concerns of the City Attorneys of South Carolina about the impact of decision in the Boulder case.

In the 1970's many of us assisted in the framing of laws to implement the Home Rule Amendment to the State Constitution. These laws have served the people of this State well up to this point. However, we are no longer able to give to our City Councils opinions that the ordinances which have been adopted to carry out the intent of the General Assembly that the people have a greater voice in local government will not subject the public treasury to depletion through the application of federal laws designed to penalize private sector unfair practices.

The Supreme Court has ignored some basic facts in its analysis of the nature of state and local governments. The same people who adopt the state constitution also elect legislators at the state and local level to pass laws to carry out the objectives of that constitution. With the advent of single member districts in the General Assembly, some members of that body are elected by fewer constituents than are the members of some city councils.

The Supreme Court apparently has equated "state" with "state legislature". We submit that "state" means "people of the state" acting either through their constitution or their elected representatives at any level of government within the framework of their constitution. The pronouncement that in our system of government there is "no place for sovereign cities" articulated in the Boulder decision demonstrates the confusion. The sovereign power of the state is exercised by its people. The Court has said, in effect, that the people of a state cannot decide by constitutional provision to regulate the use of public streets through local elected officials or the local taxpayers who must pay the costs of maintaining those streets, lest those same local taxpayers be required to pay a private businessman who contends that he has been restrained from conducting his business on public property.

This reasoning produces an impasse in South Carolina, just as it does in Colorado, in addition to making a mockery of the Tenth Amendment as

pointed out by Mayor Finlay. The South Carolina Constitution for more than 85 years has contained a provision (now Article VIII, Section 15) which prohibits the legislature from granting franchises in streets within a municipality without the consent of the city council, thereby reserving regulation of streets to local governing bodies. The use of public streets for conduct of private business is not a matter of right, but a privilege subject to franchise. City council may grant a non-exclusive franchise by ordinance. An exclusive franchise may be granted only upon approval by city voters in a referendum.

There can be no greater restraint on competition than the granting of an exclusive franchise. If the voters of a city, not those of the entire state, approve such an exclusive franchise it could be asserted that those voters had subjected the city to suit for violation of the antitrust laws. The state legislature cannot speak for the state in such a case. Does the Boulder decision mean that a statewide referendum on a purely local matter would be the only protection against an antitrust suit? There are also private risks in such cases.

I will not attempt to list the areas of possible application of this decision for fear of being repetitious. Examples of problems are legion and the potential for increase in load on federal courts is obvious. The principles of federalism suffer erosion.

The alternatives have been noted. A great deal of material has been furnished the Committee by NIMLO, the national organization of city attorneys, and we endorse the plea of that organization for legislative action. We believe that anything short of absolute immunity will only compound the uncertainties created by Boulder. This State has never recognized a distinction between proprietary and governmental functions of local governments. Federal recognition of such a distinction is undesirable. The preemption approach suggested by the dissent in Boulder leads to more litigation. To expect the courts or state legislatures to solve the problems is wishful thinking.

Local governmental regulation is a constant process of balancing public against private interests. No better vehicle for properly balancing those interests has been found than the elected officials closest to the people affected.

We urge clear resolution of the confusion by amendment establishing antitrust immunity for all levels of local government.

PREPARED TESTIMONY OF FRANK B. GUMMEY, III
CHAIRMAN, STEERING COMMITTEE
FLORIDA MUNICIPAL ATTORNEYS' ASSOCIATION

Mr. Chairman:

I am Frank Gummey, City Attorney, The City of Daytona Beach, Florida. As Chairman of the Steering Committee of the Florida Municipal Attorneys' Association, I am privileged to present to your Committee the Association's grave concerns resulting from the City of Boulder, Colorado decision.

Our clients, Florida municipal governments and their citizens, have had their future ability to effectively and economically provide vital services severely impaired by new and uncertain Federal antitrust exposure chilling and limiting the municipal decision making process.

Both the Sherman and Clayton Antitrust Acts have generally served our country very well in protecting our citizenry from unrestrained economic avarice which can destroy competitive commerce. However, it goes almost without saying that our municipal governments in this land have done a generally successful job in providing for the health, safety, and welfare of their citizens. In that process, we in government, whether at the federal, state or local level, have also recognized that there are instances when unrestrained competition can result in injury to our citizens; unfortunately, often to those citizens least able to protect themselves.

Before I mention some of the evils caused by the Boulder decision that I believe the Congress should and can correct, let me comment that this drastic policy shift embodied in the decision has been made in the absence of any compelling evidence of fault in the status of the law prior to Boulder. Put simply: If it wasn't broke, why did the Supreme Court need to fix it?

Probably the greatest evil caused by local government's new and emerging exposure to antitrust liability is the chilling affect it has had and will continue to have on the decision making process. Within the last month, I have had to advise my City Commission to end decades old relationships with our local Jaycees and a High School Band Parents' Association, despite the unanimous conviction of our elected officials that those relationships were in the best interest of our City. To expect local elected officials to decisively exercise the police powers of a municipality in an atmosphere where their attorneys can only tell them that antitrust exposure will be defined through an accumulation of several years court decisions is asking the impossible. Unfortunately, local governments will frequently avoid providing necessary and desireable services to their citizens to escape the litigation quagmire that antitrust lawsuits bring.

At a recent seminar, a member of the plaintiff's antitrust bar described the Boulder decision as the Antitrust Lawyers Relief Act. It appears that the only identified gain of the decision is that a whole new field of litigation with almost guaranteed fees, has been opened up for these attorneys. For instance, the City of Pensacola has paid approximately $50,000 of the taxpayers' money for its specially retained antitrust counsel to successfully defend it in the United States District and Circuit Courts against antitrust litigation brought by another antitrust law firm. Despite the fact that this lawsuit affected one small part of all the

City's operations, it cost Pensacola more than their City Attorney cost them for an entire year. Its citizenry got not one single benefit out of the expenditure.

Possibly the most frustrating aspect of the Boulder decision is the harm it causes to the home rule movement in this country. In this century we have seen local governments evolve from being minor functionaries of the state to vital, self-reliant providers of locally desired services. Cities have truly become the laboratories for developing innovative, successful methods for meeting citizen needs. For cities now to return to their state capitals to lobby for regimented programs dictated on a statewide basis will no more solve the infinite variety of municipal problems than federal mandates have. State legislative provisions providing antitrust immunity would probably do more harm than good.

What then is the solution? Logically, the best cure to difficulties created by federal legislation is to amend that legislation. If Congress were to extend to local government the degree of immunity enjoyed by the

Federal and State governments, we in local government could then get on with the job of promoting our citizens health, safety and welfare. It is best remembered that such immunity frees municipalities of antitrust scrutiny only if they adopt a clearly articulated and affirmatively expressed policy to replace competition and if they actively supervise such policies.

Local governments and the people who serve in them are not enemies of America's great free enterprise system. In fact, most cities' leadership are primarily employed in that system and serve their governments on a part time basis. Thus, those leaders and the citizenry who elect them have and will continue to guard against unnecessary displacement of competition much more effectively, sensibly, and rapidly than the Federal Court system, often distanced by geography and experience from the local problem at hand.

On behalf of the Florida Municipal Attorneys' Association, I thank you, Mr. Chairman, for your kind attention and gracious South Carolina hospitality.

TESTIMONY OF

HENRY W. UNDERHILL, JR.

CITY ATTORNEY

CHARLOTTE, NORTH CAROLINA

Mr. Chairman and members of the Committee:

I am Henry W. Underhill, Jr., City Attorney of Charlotte, North Carolina, appearing on behalf of the North Carolina League of Municipalities as the municipal official from the state of North Carolina designated by the League to offer testimony at this hearing. I also currently serve as First Vice President of the National Institute of Municipal Law Officers, and although I do not appear in an official capacity as a representative of that organization, I believe the opinions that I will express this morning are consistent with the position taken by the National Institute of Municipal Law Officers at a previous hearing held by this Committee in Washington, D.C. on June 30, 1982. The purpose of my appearance before this Committee is to briefly present the views of North Carolina municipal officials on the potential ramifications of the now famous Boulder decision and to request the Committee's assistance in fashioning a legislative remedy for local governments to rectify the disturbing developments stemming from the Boulder case and earlier Supreme Court decisions on the subject.

The facts and the decisions reached in the Boulder case and its antecedents are well known to this honorable Committee and thus I will not dwell upon them in my testimony. I feel that my time would be better spent in attempting to underscore the problems caused by the uncertainty experienced by municipalities in the wake of the Boulder decision, and, furthermore, to stress the need for a clearly stated national policy formulated by the Congress.

The ruling in the Boulder case now makes local governments the targets of antitrust litigation for virtually the entire range of local government activities including, but not limited to, procurement, garbage collection and disposal, water and sewer rate setting, electrical systems, zoning and land use, as well as franchising and licensing of all types such as CATV systems, taxicabs, wrecker services, and concession arrangements, In short, practically every public policy decision is now "fair game" and ripe for antitrust attack. This potential exposure is logically predictable since governmental regulations, by their very nature, tend to favor one segment of an economic community over another. City governments are inherently monopolistic in many

respects because they were created to provide governmental services necessary to protect the health, safety, and welfare of their citizens. I am fearful that the primary impact of the Boulder decision may be to cripple effective decision making on matters of public policy at the local level, because of the far reaching consequences of a subsequent successful antitrust challenge.

The majority opinion in the Boulder case suggests that the ruling did not "threaten the legitimate exercise of govenmental power." Some legal experts and special interest groups also suggest that the furor over the Boulder decision is an over-reaction since cities may request their state legislatures to pass immunizing legislation, and hence cure the so-called problem. I do not believe this approach to be either particularly desirable or realistic. Utilizing this approach, and given the evolving development of case law in this area, the only sure way to avoid exposure under the antitrust laws is for states to assume supervisory authority over matters that have traditionally been the subject of local concern. I submit that this likely will lead to the establishment of state boards and agencies to actively review or supervise purely municipal matters thereby creating another layer of bureaucracy which I believe to be an unsatisfactory result. Furthermore, as pointed out by the testimony of the Honorable Janet Gray Hayes, Mayor of San Jose, California, before this Committee on June 30, 1982, the essential issues of the coverage of the federal antitrust laws are now going to be subject to the legislative process of each of the 50 states. Such a fragmented, piecemeal approach to a problem of this magnitude is surely undesirable, frankly quite frightening, and therefore fails to provide a reasonable solution to the dilemma that local governments now face.

I would now like to quickly turn to the potential impact of the Boulder decision on municipal budgets. Until about four years ago, in the days before the Lafayette ruling, city attorneys had little cause to concern themselves with antitrust analysis and hence I believe it is safe to say that municipal attorneys as a group have little or no real antitrust experience. In light of the Lafayette and Boulder decisions it is now mandatory that municipal attorneys educate themselves about the nuances of state and federal antitrust statutes as well as learn how to litigate and competently defend antitrust suits. This necessary experience and knowledge cannot be acquired overnight.

Charlotte, North Carolina, the city that I represent, is the largest city in the two Carolinas, with a population slightly in excess of 300,000 persons. The city has a professional legal staff of eight attorneys, including myself, which constitutes the largest full-time staff of municipal attorneys in the two states. Although I firmly believe that the attorneys associated with my office are exceptionally competent and capable, none of them, again including myself, have any background or experience in antitrust law, a situation which I suspect is the rule rather than the exception.

The North Carolina League of Municipalities consists of 455 member cities and towns. Of that number, there is one city over 200,000, that being Charlotte; 7 cities between 50,000 and 200,000; 62 municipalities between 5,000 and 50,000; and 385 municipalities less than 5,000 persons in population. I respectfully submit to this Committee that an antitrust lawsuit brought against the average North Carolina municipality and fully litigated would be financially devastating to the community. As I have indicated, city attorneys, both in North Carolina and nationwide, rarely have sufficient antitrust backgrounds to adequately represent their municipalities in antitrust challenges, thereby requiring the municipality to retain outside counsel at considerable expense to represent its interest. Even if the municipality is successful and prevails in the litigation, attorney fees alone for their retained counsel would be a substantial and drastic drain on the public treasury. An even greater financial impact occurs if the municipality loses the lawsuit. If that unfortunate situation develops, the municipality would have to pay treble any damages awarded, and, by law, the plaintiff's attorney fees. The enormous expenses associated with antitrust litigation could literally financially wipeout a small community.

The likelihood that such a situation may occur is not idle speculation. Previously, this Committee has received the preliminary results of a nation-wide survey conducted by the National Institute of Municipal Law Officers. Of the cities reporting, at least fifty have been or presently are engaged in antitrust litigation covering the entire spectrum of municipal activity. Although I am not personally aware of any pending antitrust litigation in the state of North Carolina against local governments, I am advised by several of my city attorney colleagues that there are situations in their communities that may eventually ripen into lawsuits in the forseeable future.

In conclusion, the Boulder case and its antecedents pose substantial problems for North Carolina municipalities in that it both threatens to significantly remove local control over local activities by placing such control in the hands of a state agency while causing incalculable budget problems for municipal officials. I submit that the legitimate purpose of the federal antitrust laws is to deter anti-competitive conduct and activities by private parties, not to impair the ability of municipalities to govern. In my opinion, Mr. Chairman, it is unquestionably clear that the only workable solution to the dilemma is for the Congress to adopt legislation clarifying the applicability of federal antitrust laws to municipalities by providing cities and other municipal entities with the same status as that enjoyed by the states. Congressional action along these lines will help restore the traditional concepts of federalism and return a sense of balance to the inter-governmental structure.

Respectfully submitted,

Henry W. Underhill Jr.

Henry W. Underhill, Jr.

City Attorney,

Charlotte, North Carolina

The CHAIRMAN. Our next witness is Mr. Donald Russell, senior vice president of Sonoco Products Co., Hartsville, S.C., representing the American Paper Institute.

STATEMENT OF DONALD R. RUSSELL, SENIOR VICE PRESIDENT, SONOCO PRODUCTS CO., HARTSVILLE, S.C.

Mr. RUSSELL. Good morning. My name is Donald R. Russell. I am the senior vice president for paper and packaging of Sonoco Products Co., located in Hartsville, S.C. My statement is presented on behalf of Sonoco Products Co., and the American Paper Institute whose member companies produce approximately 90 percent of the pulp, paper, and paperboard made annually in the United States.

I am pleased to testify before this committee concerning the so-called municipal action exemption from the Federal antitrust laws and its impact upon one segment of the paper and paperboard industry; namely, the recycled paper industry. Briefly, by way of background on the industry, out of the 700 papermills in the United States, nearly half use some recycled fiber in the manufacture of new paper products and 200 mills depend exclusively upon waste paper as their raw material. Sonoco Products Co. operates 12 mills that rely almost entirely on waste paper. Overall, the paper industry used 15.4 million of the 18 million tons collected in 1981. Recyclable paper now accounts for 23 percent of all fiber used to make paper and paperboard in this Nation.

The major concern of the recycled paper industry with the municipal action exemption from the Federal antitrust laws being sought by local governments is that such an exemption represents potential dangers to the free market system of this Nation. An example of such a danger is the issue of whether or not the free market system will determine the destination of recyclable paper, an issue is critical to Sonoco Products Co. and one on which I would like to focus today.

Our industry's concern stems from the fact that some local governments are seeking to create a monopoly over the disposal of all solid waste and thereby interfere with the private sector's access to the recyclable portion of the solid waste stream for its use as an industrial raw material. The impetus for this action is the trend toward energy recovery from solid waste as an alternative to other solid waste disposal methods.

In order to assure the economic viability of facilities which convert solid waste into energy, it is necessary for a certain volume of waste to flow through the plant for the life of the project. Sometimes municipalities are required by the financial institutions underwriting the bonds for these projects to lock up all solid waste generated in the area of the proposed facility. This monopoly over the disposal of solid waste is effected through local flow control ordinances which require, pursuant to civil and criminal penalties, that solid waste, including recyclable materials such as paper, be diverted to the municipal burn plant. Consequently, recyclers are denied access to their raw material. In addition, those who collect solid waste must pay a tipping fee for its disposal, including a fee on that material which is typically sold to be recycled.

Resource breaks down into two categories: First, materials recovery, or recycling; and second, energy recovery, which is burning solid waste to recover its energy value. By directing recyclables to a burn plant, one of the major objectives of solid waste management, that of materials recovery, is defeated. This result is unnecessary. When waste-to-energy facilities are properly sized to burn only unwanted solid waste, energy recovery and recycling are compatible. In the process, municipalities may be assured that maximum amounts of energy and materials will be recovered.

The long-term impact of hundreds of waste-to-energy facilities across the Nation, which are oversized to permit the burning of valuable and marketable recyclables in addition to solid waste, could be devastating to the raw material supply of the recycled paper industry.

Operating under a municipal action exemption from Federal antitrust laws, local governments could, at their discretion, displace competition for recyclable materials by directing that these materials flow to a waste-to-energy facility; eliminate a source of industrial raw materials; and interfere with the flow of recyclables in commerce. Furthermore, the recycled paper industry could not even mount a judicial challenge to such a restraint on trade. This is because the U.S. Constitution places full authority in the Congress to regulate interstate commerce, and, therefore, such a statutory exemption may bar suits against municipalities for interference with interstate commerce. Even the States do not enjoy this much immunity from suit.

For these reasons, we are extremely concerned about legislation granting a municipal action exemption from the Federal antitrust laws because of its potential impact on paper recycling. Local governments should not have the power to displace viable economic concerns such as the paper recycling industry, and, in addition, private industry should not be without legal recourse against unlawful restraints on trade. As the recent U.S. Supreme Court decision in *Community Communications Company, Incorporated* v. *City of Boulder* (50 U.S.L.W. 4114 1982) makes clear, municipalities are subject to the antitrust laws when they unlawfully restrain trade, but they may also be exempt from the operation of those laws if the States, from which the municipalities derive their legal authority, enact a clear and affirmative policy authorizing such restraint on trade.

We respectfully submit that the *Boulder* decision represents the best policy for assuring a proper balance between the legitimate best interests of our private enterprise system and those of the municipalities charged with protecting the public health, safety, and welfare.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

The CHAIRMAN. What is the compromise you're suggesting?

Mr. RUSSELL. Well, I think the municipalities need some relief from being totally liable under all the antitrust laws. However, to gain that relief, I don't think it is necessary to take away the rights of industry to have access to their raw materials. I think it might be possible for a law to be put together that would answer both of these needs.

The CHAIRMAN. I have a few questions here I'd like to propound to you.

On page 2 of your written testimony you note that some local governments are trying to create a monopoly over all solid waste disposal. Can you give us some examples of where this is happening?

Mr. RUSSELL. Yes. I believe there is a case that is under appeal in the Federal courts now where the rights of the waste collectors and the recyclers were put in question.

The CHAIRMAN. Mr. Russell, you also note that many waste-to-energy facilities are being built oversized to permit the burning of paper which could be recycled. Before the decision on how big a facility to build is made, does the public, including companies like Sonoco, have an opportunity to participate in hearings or otherwise express their concern over the effect such facility will have on their business?

Mr. RUSSELL. Well, we always try as a company and as an industry to make that interest when these industries are being made by local municipalities.

The CHAIRMAN. Let me repeat a question I asked the city attorneys concerning the degree of State authorization necessary under *Boulder* to immunize local government activity. Do you believe that States would have to authorize each particular governmental decision made on a local level, or do you believe that the authorization of the type of State action challenged would be adequate to satisfy the standard for antitrust immunity?

Mr. RUSSELL. I think that if the definition of that qualification was satisfactory that it would be done rather than having to rule on each specific issue.

The CHAIRMAN. Mr. Russell, many of the witnesses today have shared their concern over the tremendous financial impact a treble damages award could have on a small city or town. Concern has also been expressed with the uncertainty of the law, which seems to be the result of *Boulder*. While it appears to me that these are legimate problems, I also understand your concerns over the serious impact the actions of a municipality could have on your business. How can we resolve this problem and accommodate both public and private interests, and specifically, would the American Paper Institute support, for example, narrowing the available remedies against local governments from treble damages to perhaps single damages or injunctive relief?

Mr. RUSSELL. Yes, I think such a compromise is possible. I don't think additional compromises to be a definition that would exclude valuable materials. Therefore, wouldn't necessarily come in question. I think our concern is why burn something that has higher burning value when we burn something that can be recycled.

The CHAIRMAN. Would the city loose anything financially if you recycled instead of burned?

Mr. RUSSELL. No.

The CHAIRMAN. Does that include recycling tin as well as paper?

Mr. RUSSELL. The flow control ordinances gives the right of the city of the municipalities to direct the flow of any waste material in their jurisdiction and it would be up to them, yes.

The CHAIRMAN. Does your company recycle tin as well as paper?

Mr. RUSSELL. Yes, we recycle metal as well as paper.

The CHAIRMAN. Does your organization, for instance, buy newspapers that have been read when people are through with them?

Mr. RUSSELL. Yes, sir, we do. We work with churches, women's clubs, and Boy Scouts throughout the nation. There are a lot of companies involved in recycling in some manner and we buy from all of those organizations.

The CHAIRMAN. Thank you.

[The prepared statement of Mr. Russell follows:]

TESTIMONY OF DONALD R. RUSSELL

Good morning. My name is Donald R. Russell. I am the Senior Vice President for Paper and Packaging of Sonoco Products Company, located in Hartsville, South Carolina. My statement is presented on behalf of Sonoco Products Company and the American Paper Institute whose member companies produce approximately 90% of the pulp, paper, and paperboard made annually in the United States.

I am pleased to testify before this Committee concerning the so-called municipal action exemption from the federal antitrust laws and its impact upon one segment of the paper and paperboard industry, namely the recycled paper industry. Briefly, by way of background on the industry, out of the 700 paper mills in the United States, nearly half use some recycled fiber in the manufacture of new paper products and 200 mills depend exclusively upon waste paper as their raw material. Sonoco Products Company operates 12 mills that rely almost entirely on waste paper. Overall, the paper industry used 15.4 million of the 18 million tons collected in 1981. Recyclable paper now accounts for 23 percent of all fiber used to make paper and paperboard in this nation.

The major concern of the recycled paper industry with the municipal action exemption from the federal antitrust laws being sought by local governments is that such an exemption represents potential dangers to the free market system of this nation. An example of such a danger is the issue of whether or not the free market system will determine the destination of recyclable paper, an issue which is critical to Sonoco Products Company and one on which I would like to focus today.

Our industry's concern stems from the fact that some local governments are seeking to create a monopoly over the disposal of all solid waste and thereby interfere with the private sector's access to the recyclable portion of the solid waste stream for its use as an industrial raw material. The impetus for this action is the trend toward energy recovery from solid waste as an alternative to other solid waste disposal methods.

In order to assure the economic viability of facilities which convert solid waste into energy, it is necessary for a certain volume of waste to flow through the plant for the life of the project. Sometimes municipalities are required by the financial institutions underwriting the bonds for these projects to lock up all solid waste generated in the area of the proposed facility. This monopoly over the disposal of solid waste is effected through local flow control ordinances which require, pursuant to civil and criminal penalties, that solid waste, including recyclable materials such as paper, be diverted to the municipal burn plant. Consequently, recyclers are denied access to their raw material. In addition, those who collect solid waste must pay a tipping fee for its disposal, including a fee on that material which is typically sold to be recycled.

Resource recovery breaks down into two categories: (1) materials recovery, or recycling; and (2) energy recovery, which is burning solid waste to recover its energy value. By directing recyclables to a burn plant, one of the major objectives of solid waste management, that of materials recovery, is defeated. This result is unnecessary. When waste-to-energy facilities are properly sized to burn only unwanted solid waste, energy recovery and recycling are compatible. In the process, municipalities may be assured that maximum amounts of energy and materials will be recovered.

The long-term impact of hundreds of waste-to-energy facilities across the nation, which are over-sized to permit the burning of valuable and marketable recyclables in addition to solid waste, could be devastating to the raw material supply of the recycled paper industry.

Operating under a municipal action exemption from federal antitrust laws, local governments could, at their discretion, displace competition for recyclable materials by directing that these materials flow to a waste-to-energy facility; eliminate a source of industrial raw materials; and interfere with the flow of recyclables in commerce. Furthermore, the recycled paper industry could not even mount a judicial challenge to such a restraint on trade. This is because the United States Constitution places full authority in the Congress to regulate interstate commerce, and, therefore, such a statutory exemption may bar suits against municipalities for interference with interstate commerce. Even the states do not enjoy this much immunity from suit.

For these reasons, we are extremely concerned about legislation granting a municipal action exemption from the federal antitrust laws because of its potential impact on paper recycling. Local governments should not have the power to displace viable economic concerns such as the paper recycling industry, and, in addition, private industry should not be without legal recourse against unlawful restraints on trade. As the recent U.S. Supreme Court decision in Community Communications Company, Inc. v. City of Boulder (50 U.S.L.W. 4114 1982) makes clear, municipalities are subject to the antitrust laws when they unlawfully restrain trade, but they may also be exempt from the operation of those laws if the states, from which the municipalities derive their legal authority, enact a clear and affirmative policy authorizing such restraint on trade.

We respectfully submit that the Boulder decision represents the best policy for assuring a proper balance between the legitimate best interests of our private enterprise system and those of the municipalities charged with protecting the public health, safety, and welfare.

Thank you for the opportunity to testify today. I would be happy to answer any questions.

The CHAIRMAN. Thank all of you very much for your presence here today.

Is there anyone else that has anything to say on this subject, if not we stand adjourned.

[Whereupon the hearing ended approximately 12:30 p.m.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

STATEMENT

OF

HOWARD ADLER, JR.

Mr. Chairman and Members of the Committee:

Introduction

I am a member of the Washington, D.C. law firm of Bergson, Borkland, Margolis & Adler and have been an antitrust practitioner for more than 25 years. In Community Communications Co. v. City of Boulder, */, the Supreme Court held that cities, unlike states, could violate the Sherman Act by enacting anticompetitive local ordinances--for example, as in Boulder, an ordinance prohibiting a cable TV franchisee from expanding its business into other parts of the city. Based on my experience as an antitrust lawyer, I am convinced that the Boulder decision should be overturned by an act of Congress that would reaffirm that the Sherman Act is concerned with private business combinations and does not interdict "anticompetitive" government action by state and local governments. This principle is already well established as to the states, Parker v. Brown, 317 U.S. 341 (1943), and there is no valid basis for the distinction drawn in Boulder between states and their political subdivisions. That distinction not only creates immense conceptual and practical problems, but is inconsistent with the legislative history and prior uniform interpretation of the Sherman Act.

II.

The Proposed Amendment and Its Implications

The practical problems and uncertainty created by Boulder can be eliminated by a straightforward amendment of the Sherman Act that would make the Parker doctrine applicable to economic regulations duly adopted by municipalities and other governmental subdivisions. Specifically, it is proposed that a new paragraph be added to Title 15 of the United States Code that would provide in substance as follows:

> The Federal antitrust laws shall apply to laws, ordinances, or regulations promulgated by a political subdivision of a State acting within the scope of its general or specific enabling legislation or authority, and to the actions taken pursuant to such laws, ordinances

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*/ 455 U.S. 40 (1982).

> or regulations by a political subdivision or its officers or agents, only to the extent, if any, that the Federal antitrust laws would apply to the same or similar laws, ordinances, regulations, or actions of a State, or its officers or agents.

This is a limited amendment that neither weakens the antitrust laws nor alters the existing relationship between a state and its subdivisions. It would have the following effects:

First. It would make clear that the federal antitrust laws do not preempt local government regulation any more (or any less) than they occupy the field of state economic regulation. It would thus abolish the distinction drawn by Boulder between states and municipalities, a distinction that Justice Rehnquist could find "no principled basis to support," id. at 69.

Second. The amendment would provide a quick and cost-effective answer to the numerous and complex questions raised by Boulder. Cities could then be guided by Parker and the extensive post-Parker case law. There would be no need for the costly and protracted antitrust litigation that will otherwise occur, and it would obviate the need for multiplicitous approaches to the state legislatures.

Third. The amendment would not change or weaken the antitrust laws. Rather, it would create a situation in which municipal ordinances and state laws would both be upheld if they met the state action critera established by the Court in California Retail Liquor Dealers Ass'n v. Midcal Aluminium Inc., 445 U.S. 97 (1980). As Justice Rehnquist stated, "the ordinance survives if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and if the city actively supervises and implements this policy, but there would be federal preemption to the extent that a city, like a state, could not "simply authorize private parties to engage in activities that would violate the Sherman Act." Boulder, at 68-69. Moreover, the amendment does not purport to resolve, as to either states or municipalities, any open questions under the Parker doctrine, such as whether a state can violate the Sherman Act by becoming a "participant in a private agreement or combination by others for restraint of trade," Parker v. Brown, supra, at 351-52, or whether, as Chief Justice Burger believes, there can be antitrust liability for proprietary as opposed to governmental acts. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 422 (1978).

Fourth. The amendment neither expands nor diminishes the authority of substate governmental entities to act. It merely provides that the federal antitrust laws do not apply to anticompetitive economic regulation by such entities where they are acting "pursuant to general or specific enabling legislation or authority."

Finally, as shown in Part III, the proposed amendment not only provides a quick and pragmatic solution to a complex set of problems, but it is soundly based in the analysis of the Parker case, itself, and in the legislative history and prior interpretations of the Sherman Act.

III.

The Proposed Amendment Finds Strong Support in Parker and the Legislative History and Prior Interpretations of the Sherman Act

In Parker, the Court considered the legality of a California regulatory scheme to control the production and distribution of raisins. There was no question that this scheme would have violated the Sherman Act had it been implemented through private rather than state action; and the Court assumed "that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilizing program . . . because of its effect on interstate commerce." 317 U.S. at 350. It concluded, however, that Congress had not occupied the field so as to interdict state action restricting competition. The Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Id. at 350-51. The Sherman Act, itself, the Court continued, "makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state," (id. at 351), and the Court found that the "sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations," 21 Cong. Rec. 2562, 2457; see also at 2454, 2461." (Id.). Accordingly, while a state may not simply authorize private persons to violate the Sherman Act, the Court held that the Act does not prevent a state from adopting a regulatory scheme which restricts competition.

There is absolutely nothing in the Parker opinion that supports the premise of Boulder that there is a dichotomy between the state and municipalities. To the contrary, the Court not only stressed the congressional preoccupation with "business combinations," but in its lone reference to municipalities it treated states and municipaliites alike. Thus, the Court in Parker reserved the issue of whether its rule applies where "the state or its municipality become[s] a participant in a private agreement or combination by others for restraint of trade," id. at 450, clearly implying that the same issue is raised whether the state "or its municipality" is involved.

A review of the legislative history confirms the Court's conclusion in Parker that Congress was concerned with the economic evils resulting from private trusts, combinations and conspiracies. As then perceived, a trust was "a union or a combination, rarely of individuals, usually of corporations, dealing in or producing a certain commodity" created for the purpose of controlling production or sale of that commodity. See 21 Cong. Rec. 137, 51st Cong., 1st Sess. (December 10, 1889) (remarks of Sen. Turpin). It was the action of such private trusts at which the prohibitions of the Act were directed.

Thus, when the bill was debated in Congress, Senator Sherman asserted that its purpose was to prevent only "business combinations," 21 Cong. Rec. 2457, 2562, a theme reiterated by Senators Allison (Id. at 2471), Pugh (Id. at 2558), and Morgan (Id. at 2609). As Senator George stated, "the great evil at which all this legislation ought to be directed" was the great private trusts of the era. Id. at 3147. Similarly, in the House, Representative Wilson spoke in favor of the Act as prohibiting combinations among

"competing producers. . . ." Id. at 4090. This legislative history leaves no doubt that Congress's aim was to control private, not governmental, actions in restraint of trade.

As the Supreme Court observed in Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n. 15 (1940), "The unanimity with which foes and supporters of the bill spoke of its aims . . . permit use of the debates in interpreting the purposes of the act." Those debates demonstrated that the Sherman Act was intended to prevent "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ." Id. at 492-93. Consequently, the Court concluded that the purpose of the Act was to protect "business competition" against restraints of trade, id. at 493 n. 15, and that such restraints encompassed "only those which are comparable to restraints deemed illegal at common law. . . ." Id. at 498.

Government regulations which restrict competition, whether state or local, were not "deemed illegal at common law." In fact, as discussed in the Senate, state common law precedents explicitly recognized the validity of municipally-franchised monopolies while barring private agreements among such monopolies. 21 Cong. Rec. at 2459 (remarks of Senator Sherman, citing, e.g., Chicago Gas Light and Coke Co. v. People's Gas-Light and Coke Co., 121 Ill. 530, 13 N.E. 169 (1849)). As noted earlier, the same theme was reiterated in Parker v. Brown, where the Court, relying on the legislative history, concluded that the Act was adopted to prevent only "business combinations" as opposed to governmental acts. 317 U.S. at 351.

Until the Supreme Court began to muddy the waters with its plurality decision in City of Lafayette, an unbroken line of lower federal Court cases had applied the Parker doctrine to all "governmental functions", E.W. Wiggins Airways, Inc. v. Massachusetts Port Auth., 362 F.2d 52, 55-56 (1st Cir. 1966), cert. denied, 385 U.S. 947 (1966), with no distinction being made between states and their political subdivisions. These cases, as aptly capsulized by the court in Alphin v. Henson, 392 F. Supp. 813, 826 (D. Md. 1975), aff'd on other grounds, 538 F.2d 85 (4th Cir.), as modified, 552 F.2d 1033 (4th Cir.), cert. denied, 429 U.S. 960 (1976), have "held that the antitrust laws are aimed at private action, not at governmental action; that states, cities, and gpvernmental agencies cannot be held liable for violations of the antitrust laws; and that restraints of trade which arise from valid governmental action cannot give rise to private antitrust liability." In the Alphin case, this rule was, in fact, applied to actions undertaken by a city. Id. at 827.

In all, I have identified comparable applications of the Parker rule to subordinate governmental units or agencies in six circuits. These include, in addition to Alphin, the Wiggins Airways case, supra, in which the First Circuit held that the Parker doctrine exempted a Port Authority from the prohibitions of the Act where the Authority had granted an exclusive transportation franchise for service to and from the Boston airport. Similarly, in Pagett v. Louisville and Jefferson Cty. Air Board, 492 F.2d 1258 (6th Cir. 1974) (per curiam), the Sixth Circuit held that an agency with less-than-statewide "quasi-governmental" authority could lawfully regulate taxi operations to and from the county airport. In Ladue Local Lines Inc. v. Bi-State Develop.

Agency, 433 F.2d 131 (8th Cir. 1970), the Eighth Circuit held that a two-state agency created by compact between Illinois and Missouri could lawfully monopolize school bus services under the Parker doctrine. Notably, in New Mexico v. American Petrofina, Inc., 501 F.2d 363, 370 n. 15 (9th Cir. 1974), the Parker rule was held to bar claims of anticompetitive purchasing policies by a state and its alleged co-conspirators--namely, its subdivisions, cities, and counties. And in Continental Bus Systems v. City of Dallas, 386 F. Supp. 359, 363 (N.D. Tex. 1974), the district court observed that "lower courts consistently have followed [the Parker] rule exempting governmental activities from the congressional ban on monopolistic enterprises," and on this basis rejected a challenge to the city's action in granting an exclusive franchise for airport bus service.

Justice Brennan, in his majority opinion in Boulder, failed to consider either the legislative history that was so decisive in Parker or the lower court opinions which have uniformly equated municipalities with states under the Parker doctrine. Rather, Justice Brennan's opinion rests almost totally upon the interpretation of Parker in Midcal, New Moter Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), and City of Lafayette.

Midcal and Orrin W. Fox, however, did not deal with the distinction between state and municipal conduct, but with private anticompetitive conduct pursuant to state regulation. Neither case involved the underlying issue in Boulder and neither purported to state a rule of law applicable to municipal government conduct. Only in City of Lafayette was a dichotomy drawn between states and municipalities and, in that case, only four Justices accepted the distinction. Chief Justice Burger joined with those four, but only on the basis of a purported distinction between governmental and proprietary activity. The Parker doctrine, he believed, applied only to governmental action and this was true whether a state or a municipality was concerned, 435 U.S. at 422 n.3, 423 n.4, 425 n.6. Thus, as recently as the City of Lafayette decision, a majority of the Supreme Court had rejected the distinction now drawn in Boulder between states and their political subdivisions.

Conclusion

For all of the reasons presented in this Statement, I urge that the antitrust laws be amended to conform to the original intent of Congress. Such an amendment, as I have shown, will provide a quick and pragmatic solution to the many problems raised by the Court's ill-considered Boulder opinion. At the same time, it in no way weakens substantive antitrust law or alters the existing relationship between states and municipalities and other political subdivisions.

1981 ANNUAL REPORT

TO THE

NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

FROM THE

COMMITTEE ON ANTITRUST LAW AND MUNICIPALITIES

ROBERT J. LOGAN
Chairman

City Attorney
San Jose, California

HISTORICAL EVOLUTION

This report is the first of the Committee on Antitrust Law and Municipalities. Because this is the first report, it will cover more than just the activities of last year.

Most municipal attorneys are already aware of the antitrust aspect of municipal law. However, most have not had any direct involvement. But as each year passes, more and more antitrust actions involving municipalities are filed.

To understand the court decisions of today it is important to understand the history which underlies municipal liability under the Sherman and Clayton Acts (15 U.S.C. Sec. 1, et seq.).

W. B. Parker, the Director of California's Department of Agriculture, had just completed an elaborate marketing program for the 1940 raisin crop. Porter L. Brown, a producer and packer of raisins, was dissatisfied with this scheme. As a consequence, he brought an action under the antitrust laws of the United States against Parker and the State of California. By 1943 the matter was before the U. S. Supreme Court (Parker v. Brown (1943) 317 U.S. 341). The Supreme Court's opinion, written by Chief Justice Harlan Fiske Stone, concluded, among other things, that Mr. Brown could not successfully bring an antitrust action against Parker or the State of California. Although it was true, noted the Court, that the state could not give immunity to those who violate the Sherman Act by authorizing them to do so, the antitrust laws are intended to prohibit individual, not state, conduct. And so, everyone thought, the Court had declared that states, state agencies and their subdivisions were immune from the antitrust laws.

But in 1975, some thirty years later, the extensively held viewpoint that public agencies were immune was put to the test. Goldfarb v. Virginia State Bar (1975) 421 U.S. 773. The Supreme Court began to waiver in summarily applying Parker immunity to public agencies. States, acting in their sovereign capacity, were immune. That immunity even could be delegated to state agencies or subdivisions if the anti-competitive activity was compelled by the state, rather than simply prompted or generally authorized. The State Bar of Virginia, the agency responsible for the regulation of attorneys in the state, could not depend upon Parker immunity in a situation in which the local bar associations agreed to certain fee schedules. Without the state acting in a manner through the State Bar compelling adoption of price schedules, the activity was no longer the consequence of an act of sovereignty and, therefore, not exempt.

The following year the Court again refined its position regarding Parker immunity. Cantor v. Detroit Edison Company (1976) 428 U.S. 579. Michigan Public Services Commission regulated the rates for Detroit Edison. Detroit Edison had, as part of its tariffs, for years included the dispensing of free light bulbs. Of course, the cost of light bulbs was picked up in the rate approved by the Commission. The Court was not satisfied that this distribution of light bulbs was within the delegated authority from the State of Michigan to its Public

Services Commission, especially since there was no reference which, in any way, delegated authority to distribute light bulbs. For some reason, the Court did not talk about whether the cost of light bulbs to the consumer would go up because of the preservation of competition. It simply preserved competition in light bulbs at whatever cost to the consumer. Though Detroit Edison strenuously urged that there was compulsion from the Public Services Commission's control over Edison's rates, the Court was unconvinced. In order for Parker immunity to apply, the state agency that could otherwise compel certain anti-competitive activity must itself be directly invested by the state with authority to allow anticompetitive activity. Otherwise,there is no act of sovereignty. The Court concluded that the mere fact of regulation by a state does not authorize private violations of the antitrust laws.

The following year a further refinement occurred. Bates v. State Bar of Arizona (1977) 433 U.S. 350. The Court carefully set forth that in order for Parker immunity to attach there must be an "affirmative expression" of state policy, not merely acquiesence. The law firm of Bates and O'Steen was advertising in violation of state bar rules of conduct. When brought up on charges, they sued the state bar, alleging, among other things, a violation of antitrust laws. Regulation of advertising by attorneys came directly from the Arizona Supreme Court and was an affirmative expression of the State's policy to regulate attorneys. Unlike the situation in Goldfarb, the Arizona Supreme Court, the state body in charge of regulation of attorneys, took an active role in regulating advertising. In Goldfarb the State Bar merely acquiesced in the setting of fees.

Until 1978, the Supreme Court had only ruled on cases regarding state activities or state regulated activities. In 1978, the Court, for the first time, looked at the Parker doctrine as it relates to local public agencies. City of Lafayette, Louisiana v. Louisiana Power & Light Co. (1978) 435 U.S. 389. A severely split Court concluded that a local agency may, in fact, violate antitrust laws in the operation of municipal owned activities. The four dissenting Justices indicated that Parker immunity should be applied to municipalities. The four Justices writing the opinion of the Court favored application of the antitrust laws to activities of local agencies where those activities were not state authorized. Chief Justice Burger, the swing vote, agreed that the antitrust laws could apply to local agencies. But in his opinion, application would depend upon whether the municipal activity was governmental or proprietary. If cities intend on competing with private industry, cities should be accorded the same treatment as any other business enterprise.

The Court's plurality concluded that the only way Parker immunity would attach was if there was adequate state involvement in the municipal activity. The state must have given authority to the local governmental entity to operate in a particular area in an anti-competitive fashion. If the authority was not specific, it must be found that the legislature contemplated the kind of action complained of. It is interesting to note that the "compulsion" standard that the Court required in Goldfarb was not applied to a local agency. Did the Court recognize the right of states to broadly delegate general regulatory power to municipal entities? Because of the split on the Court, there was and is no clear answer to that question.

As noted, the Chief Justice's concurring opinion in Lafayette was based on what he perceived to be a difference between governmental and proprietary activities. That distinction may be a key to future decisions. A great deal of what happens will depend on how Justice O'Connor views the issue. It is fair to say that the Court has yet to clearly articulate a standard to be applied to local agencies in the area of antitrust. We do know that simply because local agency actions serve some public welfare purpose, the public nature of the activity may not be enough to bring about protection under the Parker doctrine. We also know the Court is concerned that thousands of local government agencies may be advancing their own municipal financial interests at the expense of the marketplace.

Again, that same year, the Court decided New Motor Vehicle Board v. Orrin W. Fox Co. (1978) 439 U.S. 96. Once again the Court refined its position related to state agencies. For immunity to attach, the state authority must be "clearly articulated and affirmatively expressed."

In 1980, the Court added a new catch phrase in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. (1980) 445 U.S. 97. California's wine pricing program (wine producers and wholesalers filed with the State fair trade contracts or price schedules) was clearly articulated and affirmatively expressed. But the Court apparently determined that something more was needed. The something more was "active supervision". The test for Parker protection was now threefold. Unless the three elements exist, Parker immunity will not attach, at least when it relates to state agency activities. What we do not know is whether this standard applies to local public agencies. The cases in which this standard has been applied by the U.S. Supreme Court have all involved state agencies only, not local jurisdictions.

Some Federal District Courts have tried to apply the clear articulation and active supervision test to local agencies, but its application is confusing at best since the state generally delegates its authority to local agencies in broad, rather than narrow, terms. States, seldom if ever, actively supervise local agencies when those agencies are acting within traditional governmental areas.

If anything, the Lafayette case appeared to apply a different standard to cities. For instance, the Court did not concern itself with "compulsion". It did not concern itself with the State "clearly articulating" or "affirmatively expressing" its position, let alone "active supervision". The Court was concerned about public agencies getting into activities which actually do compete with private industry.

There is apparently a point at which Congress exceeds its commerce power. That point appears to be when a state or its subdivision is acting in an area involving an integral governmental function. National League of Cities v. Usury (1976) 426 U.S. 833. Indeed, the terminology, "integral governmental function" as a concept is finding its way into more recent cases in the area of antitrust. Hybud Equipment Corporation v. City of Akron (1981) No. 80-3121, CA 6 (7/17/81) BNA Antitrust and Trade Regulation Reporter No. 1025, A-23. The concept is tied to the governmental/proprietary distinction urged by Chief Justice Burger in Lafayette, which, if combined with the four dissenters, makes a majority of the Court. Will the National League reasoning be applied? Perhaps Community Communications Co. v. City of Boulder (heard October Term 1981, U.S. Supreme Court) will answer the question.

The potential for extensive antitrust exposure causes one to give pause. The Supreme Court has not considered the great variety of municipal governmental activities, as well as the different types and kinds of authorization which may exist pertaining to those activities. In California, Colorado, Ohio, etc., there are general law cities and there are charter cities. General law cities gain their authority from the state legislature. Charter city authority emanates from the Constitution itself. To the extent that the matter is a municipal affair, the regulations of a charter city can actually preempt inconsistent state laws. Are charter cities going to be treated in a different manner than other cities?

These are real questions which the U.S. Supreme Court has not answered. They are questions that are extremely relevant because serious issues of delegated or "equal sovereignty" exist in those states in which charter cities are given authority through the Constitution--authority which can preempt state law.

The Federal District Courts and the Federal Courts of Appeal have not necessarily been consistent in interpreting the U. S. Supreme Court's decision in Lafayette or the other cases previously mentioned (See Attachment A). As indicated earlier, the U.S. Supreme Court has heard arguments in Community Communications Co. v. City of Boulder. That case may well give answers to some of the confusion. Hopefully,

it will delineate which activities public agencies will have to be concerned about in terms of antitrust and which activities public agencies can continue to feel free to experiment with. Rather than speculate what all the lower court opinions mean--lots of good law review articles do that--I determined to augment this short historical analysis with a compendium of relevant cases. Each attorney can draw his or her own conclusions. Obviously, each city will have to contend with the various decisions. Nevertheless, at this stage of municipal antitrust evolution, the only fairly accurate barometer is the U. S. Supreme Court.

The cases are generally categorized and cover more than 1980-81 calendar years. In the future, this Committee might find it desirable to narrow the scope of its report to the previous year only and also attempt to find common threads of thought by the various courts.

Since the local state Attorneys General, along with the U. S. Attorney, can institute antitrust proceedings, I have inquired of each state whether their chief law enforcement agency intends in pursuing litigation against local agencies. The results of those inquiries are found in Attachment B.

ATTACHMENT A

I

SIGNIFICANT CASES IN THE EVOLUTION OF MUNICIPAL ANTITRUST LIABILITY

Parker v. Brown (1943) 317 U.S. 341

California's raisin prorate program which established an elaborate marketing system for raisins, which largely eliminated competition among producers, was not a violation of the antitrust laws. This case is the historical genesis of what is commonly known as the State antitrust exemption or immunity. The Court reasoned that the Sherman Antitrust Act was directed towards individual and not State conduct.

Goldfarb v. Virginia State Bar (1975) 421 U.S. 773

The Fairfax County Bar Association's minimum fee schedule, which was enforced by the Virginia State Bar, was found to be an unlawful price fixing scheme in violation of the antitrust laws. The Court found that since the State of Virginia did not compel keeping of such a schedule that the Parker immunity did not apply.

Cantor v. Detroit Edison Co. (1976) 428 U.S. 579

Detroit Edison's dispensing of free light bulbs to consumers of electricity within its system, thereby creating a monopoly in the area of light bulbs and restraining trade thereof, was found to be a violation of the antitrust laws and not exempted by the theory of Parker v. Brown because of the fact the State was regulating the utility.

Bates v. State Bar (1977) 433 U.S. 350

The Arizona Supreme Court's rule prohibiting lawyer advertising was not a violation of the antitrust laws and was protected by the immunity of Parker v. Brown since the Arizona Supreme Court had the ultimate State authority in commanding and compelling compliance by members of the State Bar. However, the advertising was allowed on a First Amendment theory.

City of Lafayette v. Louisiana Power & Light Co. (1978) 435 U.S. 389

The City of Lafayette could only be exempt under the anti-trust laws (Parker v. Brown) if the alleged anticompetitive activities fell within the State authorization or was within the intended scope of the powers that authorized the local agency to operate a public utility. In short, cities can be liable for violation of the antitrust laws. Because the opinion was broken down four in favor, four against, and one who concurred in favor, it is difficult to discern precisely what activities will or will not fall under the prohibitions of the Sherman-Clayton Act. In either event there has to be some involvement of the State compelling the anti-competitive activity.

New Motor Vehicle Board v. Orrin W. Fox Co. (1978) 439 U.S. 96

California's automobile franchise act requires notice and a hearing where an existing franchise holder complains to the Board about new or additional prospective competition. The Court found Parker v. Brown to be applicable because the franchise act was clearly articulated and affirmatively expressed.

California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc. (1980) 445 U.S. 97

California's statutory plan for wine pricing was found to constitute resale price maintenance and, therefore, a violation of the Sherman Act. Parker v. Brown exemption was not applied. Although the State's policy was forthrightly stated and clear in purpose, it was not actively supervised by the State, thereby allowing the wine producers to continue price maintenance by whatever prices they submitted to the Board.

Community Communications Co. v. City of Boulder (To be heard Oct. Term 1981, U.S. Supreme Court)

Boulder, Colorado (a chartered city) moves to stop expansion of local CATV to look at possibility of greater competition from other cable companies. The U. S. Court of Appeal finds, as a charter city, that Boulder has "equal sovereignty" and, therefore, exempt under Parker v. Brown for those activities which are "municipal affairs" which Boulder has determined should be treated in an anti-competitive manner. The decision in this case may be pivotal regarding the entire area of antitrust immunity under the Parker exemption.

Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127

Railroad's participation in publicity campaign designed to foster adoption and retention of laws and enforcement practices destructive of the trucking business including the successful urging of a veto on a bill to protect truckers was protected activity. Attempts to influence legislation are not violative of antitrust laws.

United Mine Workers of America v. Pennington (1965) 381 U.S. 657

Efforts of union and some coal companies to influence the administrative branch of government (Secty. of Labor) are protected as attempts to influence legislative branch.

California Motor Transport Co. v. Trucking Unlimited (1972) 404 U.S. 508

Institution of proceedings in state and federal jurisdictions to defeat applications for operating rights, if done solely to harass or hinder may be violative of antitrust laws. Case developed the "sham" exception to Noerr/Pennington. Though based on constitutional grounds, there is no First Amendment protection to harass or deter competitors from having free and unlimited access to governmental activities.

II
REGULATORY ACTIVITIES

A. ZONING

1. Barbaccia v. The County of Santa Clara, et al (1978) 451 F.Supp. 260

   The City's refusal to prezone golf course recreational use to residential use on a parcel of property in the County and totally surrounded by the City might be subject to the Sherman Act especially since the City was also engaged in the golf business.

2. Whitworth v. Perkins (1978) 576 F.2d 696

   Mr. Perkins incorporates the City of Impact, Texas, which passes a law which allows it to sell alcoholic beverages. The City refuses to rezone property owned by the plaintiff, thereby eliminating his ability to sell liquor in the City. Since the refusal to rezone was alleged to be a part of the conspiracy to violate the antitrust laws, the Court noted that the mere presence of a zoning ordinance does not necessarily insulate the City from antitrust liability, thereby rejecting the State action exemption found in Parker v. Brown.

3. Mason City Ctr. Assoc. v. City of Mason City (1979) 468 F.Supp. 737

   A claim for relief was stated against the City which refused to rezone competing commercial property on the periphery of the City when the City Council had already indicated its concern to protect downtown development. After trial the City was successful in convincing the Court that the plaintiffs had tortiously interfered with their contract and recovered from the jury $250,000, plus $50,000 interest. The case is presently on appeal.

B. ANNEXATIONS

1. The City of Mishawaka, Indiana v. American Electric Power Co., Inc. (1979) 465 F.Supp. 1320

   This case has a hodgepodge of issues related to Gas City's policies of distribution of its municipal electric service in annexation of territories. The allegation was that Gas City was involved in a tying arrangement between its electrical, water and sewer services. The Court found no tying arrangement, but more importantly noted that a municipal annexation policy is not a "product" within the meaning of Section 1 of the Sherman Act or "goods, wares, merchandise, machinery, supplies or other commodities" within the meaning of Section 3 of the Clayton Act.

C. HOUSING AND REDEVELOPMENT

1. Cedar-Riverside Associates, Inc. v. U. S. (1978) 459 F.Supp. 1290

The Minneapolis Cedar Riverside Project Committee and the Minneapolis Housing and Redevelopment Authority probably did not violate the antitrust laws by preventing plaintiffs from participating in the project. The Court held that the statutory scheme in Minnesota which authorized redevelopment activities was intended to allow anti-competitive activity in that area even though not specifically authorized. The Court did leave open the question whether the lawful monopoly may have been exceeded.

D. GOVERNMENTAL PERMITS AND LICENSES

1. Grendel's Den, Inc. v. Goodwin (1980) 495 F.Supp. 761

A Massachusetts' statute which delegated to churches or schools the absolute veto power of liquor licenses to any establishment within 500 feet of a church or school was not protected by the exemption of Parker v. Brown. Even though there was a clear articulation of State policy in favor of church or school veto, there was not a clear articulation of the anti-competitive policy involved. Even if there were such an indication, the Commonwealth of Massachusetts itself was not sufficiently active in supervision.

2. Bally Manufacturing v. New Jersey Casino Control Commission (1981) No. A-50, N.J. Superior Court 3/17/81, No. 1009-D-6(1981)

The New Jersey Casino Control Commission regulation prohibiting licensed casinos from acquiring more than 50% of their slot machines from any one vendor manufacturer was found to have been articulated and affirmatively expressed as well as actively supervised and, therefore, exempt from antitrust challenge because of Parker v. Brown.

E. CABLE TELEVISION

1. Midland Telecasting Co. v. Medesa Television Co. (1980) 617 F.2d 1141

Though this case does not deal specifically with a municipality, it is significant in that the Court of Appeal found that cable television companies are not immune from the antitrust laws simply because there are Federal regulations which involve the conduct of the cable television industry.

2. Community Communications Co. v. City of Boulder (1980) 630 F.2d 704

This case is presently on appeal. Boulder, Colorado, attempts to stop the expansion of a local CATV in order to allow the possibility of additional competition from other companies. The Court of Appeal affirms that activity and finds it exempt under Parker v. Brown because of the characteristics of a charter city in the State of Colorado.

3. Community Communications Co. v. City of Boulder (1980) (new case) 496 F.Supp. 823

This particular case deals with the drawing of geographical boundaries for cable television operators and presently an injunction is in effect preventing the City from enforcing those geographical boundaries. The matter is probably subject to what happens this Fall with the Supreme Court decision in the other Community Communications case.

4. Affiliated Capital Corporation v. City of Houston (1981) No. H-79-1391, SD Tex (7/7/81)

The Federal jury found the City of Houston to be in violation of the antitrust laws to the tune of six million dollars. The Federal District Court issued a judgment notwithstanding that verdict in favor of the City of Houston.

F. REGULATED PRICING

1. California Retail Liquor Dealers' Assn. v. Midcal Aluminum, Inc. (1980) 445 U.S. 97

(See explanation under Significant Cases)
The logic of this case could easily be applied to municipalities which are involved in pricing whether it be for tow rates, cab fares or other regulated industry in which the City has involvement in the establishment of prices.

2. (combined cases)
Serlin Wine and Spirit Merchants, Inc. v. Healy
No. B-80-297 D Conn. (4/15/81)

Morgan v. Division of Liquor Control
No. B-80-280, D Conn. (4/15/81)

The Connecticut Liquor Control Act survived a challenge very similar to that in Midcal, and survived it on the basis that in Connecticut, unlike California, the Connecticut Division of Liquor Control Board directly controls the prices, rather than simply reviewing and approving prices submitted by the wine makers.

III

GENERAL GOVERNMENTAL SERVICES

A. ENTERPRISE FUNDS

1. Golf Course Use

a. Kurek v. Pleasure Driveway & Park District of Peoria (1978) 583 F.2d 378

Golf professionals whose concession rights to operate pro shops in municipal golf course have been terminated were able to state a claim for relief against the park district. The State action exemption was denied to the district. The individuals argued that the Noerr/Pennington doctrine applied since they were simply trying to obtain governmental action, but the Court viewed the matter as being part of the "sham" exception to the Noerr/Pennington doctrine in that the facts tended to support a conspiracy between the new golf professionals and the park district.

2. Parking Lots

a. Corey v. Look (1981) 641 F.2d 32

The City of Falmouth, Mass. and the Woods Hole, Martha's Vineyard & Nantucket Steamship Authority allegedly conspired and thereafter refused to deal with a parking lot operator in producing parking for the steamship authority's line. The Parker immunity was not available as a defense as the Court did not find adequate State involvement in the process.

3. Airports

a. Armersbach v. City of Cleveland (1979) 598 F.2d 1033

This is not an antitrust case, but its significance is that the Court concluded that the operation of a municipal airport is an integral function of City government.

b. Pinehurst Airlines, Inc. v. Resort Air Service, Inc. (1979) 476 F.Supp. 543

The operation of an airport according to North Carolina law is a proprietary activity. Therefore, the fact that a single fixed base operator enjoyed a monopoly at the airport could give rise to an antitrust violation. The Parker exemption was rejected by the Court.

c. Guthrie v. Genesee County, N.Y. (1980) 494 F.Supp. 950

Though the State authorization allowed the County to sublease on an "exclusive or non-exclusive basis", the Court found that the language did not evince a unanimous attempt to replace competition regarding the fixed base operation at the County airport.

d. Pueblo Aircraft Service v. City of Pueblo, Colorado (1980) 498 F.Supp. 1205

Based on the reasoning in the Community Communications case, the Court held that the City of Pueblo, Colorado, could operate its airport in an anti-competitive manner. This combined with the fact of State authorization to operate airports created an immunity from the antitrust laws. It is also important that this particular airport was owned by the City, but outside the corporate limits.

e. In Re Airport Car Rental Antitrust Litigation Master File No. MDL338 N D Cal. 1981

Car rental companies are protected by the Noerr/Pennington doctrine in trying to influence airport authorities to grant them franchises to operate at the airport facilities. This District Court opinion reverses the initial District Court opinion which found that Noerr/Pennington did not apply and that the operation of concessions at the airports could be subject to antitrust scrutiny.

4. Municipally Owned Utilities

a. City of Mishawaka, Indiana v. American Electric Power Co., Inc. (1979) 465 F.Supp. 1320

The fact that a City annexed property thereby gaining territorial rights for the expansion of its water and sewage system does not result in a tying arrangement in violation of the antitrust laws.

b. Shrader v. Horton (1979) 471 F.Supp. 1236

An ordinance requiring property owners to connect to a new public water system and abandon their reliance on an existing state approved private supply does not violate the antitrust laws. A water system is not a business enterprise for profit, rather an act of government in insuring an adequate water supply for the people.

c. The City of Gainesville v. Florida Power and Light Co. (1980) 488 F.Supp. 1258

The City which is also engaged in the utility business has the right to use the administrative process to prevent Florida Power and Light from obtaining new franchises or renewing franchises. The City is protected by the Noerr/ Pennington doctrine.

d. Highfield Water Co. v. Public Service Commission (1980) 488 F.Supp. 1176

The State of Maryland and several State agencies attempted to take over a water system. Highfield accused the State of trying to use its public service commission's processes to eliminate it from the market. The Court found in favor of the State and although noting that a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization, not any allegation of illegal means used to obtain an otherwise authorized monopoly would turn the argument of an issue of appropriate State action into an antitrust suit.

e. Community Builders, Inc. v. City of Phoenix (1981) No. 79-3354, CA 9 (8/3/81) BNA Antitrust and Trade Regulation Reporter No. 1027, A-11 (8/13/81)

Phoenix and Scottsdale divide up water service territory based upon their boundaries. Scottsdale required a higher fee than did Phoenix. The plaintiff wanted to use Phoenix's water but was denied. Since Arizona law forbade the competition between municipal utilities in the water area, the Court found no line of commerce in the provision of water services and, therefore, there was no competitive market which need be protected.

B. TRANSPORTATION

1. Taxicabs

a. Woolen v. Surtran Taxicabs, Inc. (1978) 461 F.Supp. 1025

The granting of an exclusive right to a single cab company to pick up passengers at the Dallas-Fort Worth Airport may be a violation of the antitrust laws. The Municipal Airport Act was insufficient to authorize the airport to act in such an anti-competitive manner according to the Court. Dallas' attempt to argue equal sovereignty as a charter city was also rejected.

2. Transit

a. Crocker v. Padnos (1980) 483 F.Supp. 229

The operation of transit systems in a city was deemed to be an act of government and, therefore, exempt from antitrust laws. This case involved both the City of Brockton and the New Brockton Transit Authority which was a State-created authority. The lowest bidder was not in fact selected, but there was sufficient evidence to show that he was going to withdraw his bid in any event.

C. SOLID WASTE

1. Glenwillow Landfill, Inc. v. City of Akron, Ohio (1979) 485 F.Supp. 671.

An ordinance requiring all of certain kinds of waste to go to a particular site does not violate the antitrust laws. The Ohio constitution established charter cities and the State permits local authorities to declare their own policy on garbage; therefore, the City was exempt under Parker v. Brown.

2. Hybud Equipment Corporation v. City of Akron (1981) No. 80-3121, CA 6 (7/17/81) BNA Antitrust and Trade Regulation Reporter No. 1025, A-23

A city ordinance requiring all collectors to deposit waste at a new facility and to pay a tipping fee did not violate

the antitrust laws. This case is similar to Glenwillow, but also has the added feature that the Court said in making its determination related to traditional governmental functions that the National League of Cities v. Usury (1976) 426 U.S. 833, was applicable. Congress could not directly displace the State's freedom to structure integral operations in areas of traditional governmental functions.

3. Western Waste Service System v. Universal Waste Control (1980) 616 F.2d 1094 (9th Cir.) Cert. denied, 101 S.Ct. 205

The fact that garbage trucks were purchased from out of state as well as the fact that recycled products went out of state was sufficient to find enough effect on interstate commerce for the Court to retain jurisdiction.

4. Heille v. City of St. Paul, Minnesota (1981) No. 3-80-82, D Minn. (4/8/81) BNA Antitrust and Trade Regulation Reporter No. 1014, A-19

Rubbish hauling was found not to be within interstate commerce and, therefore, the Court lacked subject matter jurisdiction in an antitrust complaint against the City of St. Paul. The Court failed to find an adequate connection even though the equipment used for the rubbish service may have traveled interstate. The Court found that was simply an incident to the trade.

D. FRANCHISING

1. Car Dealerships

a. New Motor Vehicle Board v. Orrin W. Fox Co. (1978) 439 U.S. 96

(See case note under Significant Cases)

2. Tow Car (Police Activities)

a. Kendrick v. City Council of Augusta, Georgia (1981) No. 179-266, S.D.Ga (6/19/81) BNA Antitrust and Trade Regulation Reporter No. 1022, A-15.

Police tow car operations, even though granted to one who was not the lowest bidder, are not the subject of antitrust laws because of the failure to show a substantial effect upon interstate commerce. Therefore, the Court lacked subject matter jurisdiction.

E. HEALTH CARE SERVICES

1. Hospitals

a. City of Fairfax v. Fairfax Hospital Association (1978) 598 F.2d 835

The mere fact that the County of Fairfax created an industrial development authority to issue tax free bonds to assist in the purchase and operation of one of the only two acute care hospitals in the county was insufficient to blanket the activity with Parker immunity.

b. Huron Valley Hospital v. City of Pontiac (1979) 466 F.Supp. 1301

The actions of the Michigan Department of Public Health and the Health Planning Council for Southeastern Michigan were found exempt under the antitrust laws regarding the issuance of a certificate of need for health care providers in the State.

2. Physicians

a. Feminist Women's Health Center v. Mohammad (1978) 586 F.2d 530

Unless doctors are enforcing professional standards required by State law, their activities in conspiring to increase fees or effectively boycotting an abortion center may be deemed to be a violation of the antitrust laws.

3. Chiropractors

a. Health Care Equalization v. Iowa Medical Society (1980) 501 F.Supp. 970

General supervision over the health and hygiene in establishment of rules not inconsistent with the law is protected under the Parker exemption. However, if the individual exceeds his authority, acts in bad faith, or acts out of the course and scope of his duties, that individual may have personal liability.

F. EMPLOYEE-EMPLOYER RELATIONS

1. Gross v. The University of Tennessee (1978) 448 F.Supp. 245

An antitrust challenge will not lie where the relationship is simply that of employer-employee even though the situation pertains to agreements which limit the outside income that professors could obtain if they continue to work for the University.

G. UTILITY REGULATION

1. Interconnect Planning v. American Tel. & Tel. (1978) 465 F.Supp. 811

Pervasive governmental regulation of an industry does not invest it with blanket immunity from the Federal antitrust laws. The American Telephone and Telegraph Company's interconnect policies are not protected under Parker v. Brown.

2. Sound, Inc. v. American Tel. & Tel. Co. (1980) 631 F.2d 1324

The mere filing of tariffs with the local Public Utility Commission does not necessarily protect American Tel. & Tel. from an antitrust action. Since American Tel. & Tel. has the ability to determine what rates they want to submit as tariffs, there is no State mandate on the part of the State Commission who simply reviews those tariffs and sets a hearing if they decide they are too high.

H. CORRECTIONAL FACILITIES

1. Jordan v. Mills (1979) 473 F.Supp. 13

The operation of a State prison falls under the integral governmental function spoken of in National League of Cities v. Usury and, therefore, is not subject to the antitrust laws.

I. BUSINESS AND PROFESSIONS

1. Attorneys

a. Princeton Community Phone Book, Inc. v. Bate (1978) 582 F.2d 706

The Advisory Committee on Professional Ethics of the New Jersey Supreme Court are protected by Parker v. Brown in prohibiting attorneys for paying for listings in a local phone book. The Court felt that the closer the relationship between the State and the activity, the less clearly the State need to command the precise action in order for individuals to enjoy the exemption.

b. Foley v. Alabama State Bar (1981)
No. 80-7001, CA5 (6/19/81) BNA Antitrust and Trade Regulation Reporter No. 1021, A-22

The Code of Responsibility of the State Bar of Alabama prohibiting advertisements is protected by the State exemption doctrine. Bar rules are rules of the State Supreme Court. Immunity also extends to officers or agents of the State and individuals acting on behalf of the Bar.

c. Feldmond v. Gardner (1981)
No. 78-2235

Hickey v. District of Columbia Court of Appeals (1981) No. 79-1233 CA DC (7/23/81) BNA Antitrust Trade Regulation Reporter No. 1025, A-5 (8/6/81)

The Federal District Court of Appeals in the District of Columbia controls the Bar examination rules. As the body in charge of the structure of the law in the District, it acts in a sovereign governmental capacity when it sits and, therefore, is not subject to the antitrust laws.

2. Accountants

a. U.S. v. Texas State Board of Public Accountancy (1979)
592 F.2d 919

The Texas State Board of Accountancy, made up on the whole by members of the profession, is not immune in its rule making process from the antitrust laws. The Court concluded this based upon the permissive nature of the statute allowing the promulgation of the rules as opposed to rule promulgation which is done mandatorily at State direction.

IV

MISCELLANEOUS

A. PERSONAL LIABILITY

1. Health Care Equalization v. Iowa Medical Society (1980)
501 F.Supp. 970

An individual may be held personally liable under the antitrust laws if his or her activities are done in bad faith or outside of the scope of their employment.

B. ATTORNEY'S FEES

1. Illinois v. Sangamo Construction Co. (1981)
Nos. 80-1761, 80-2275, CA 7 (7/30/81)

The State of Illinois can recover attorney fees in an amount equal to that generally prevailing in the market place for an action on behalf of the citizens as parens patriae.

C. PRESSURING OF GOVERNMENTAL OFFICIALS

1. Bustop Shelters, Inc. v. Convenience & Safety Corp. (1981)
80 Civ. 6123 (GLG), SDNY 9/10/81, BNA Antitrust and Trade Regulation Reporter No. 1031, A-22

Pressure on New York City government officials by a bidder to build and maintain a busstop shelter for the City was protected action under the Noerr/Pennington doctrine.

D. PERSONS (UNITED STATES)

1. Sea Land Service, Inc. v. Alaska Railroad (1981) No. 80-2097, CA DC (7/27/81), BNA Antitrust and Trade Regulation Reporter No. 1026, A-1 (6/6/81)

Though the United States may sue as a person under the antitrust laws, the Court declined to rule that the United States is a person who may be sued as a defendant (c.f. Hecht v. Pro-Football (1971) 444 F.2d 931) Hecht was distinguished on the basis that the D.C. Armory Board more closely resembled a municipal agency rather than a United States instrumentality.

E. MUNICIPAL LOBBYING

1. Miracle Mile Assoc. v. City of Rochester (1980) 617 F.2d 18

Cities as owners of commercial property can also exert political influence to reach a result which may be anti-competitive in effect. Cities are protected under Noerr/Pennington in this process.

F. WOMEN'S RIGHTS

1. State of Missouri v. National Organization for Women (1980) 620 F.2d 1301

The National Organization of Women is not violating the anti-trust laws by boycotting the various states which have refused to ratify the equal rights amendment. They are simply exercising their First Amendment right to petition.

G. REAL ESTATE

1. Income Realty & Mortgage, Inc. v. Denver Board of Realtors (1978) 578 F.2d 1326

The actions of the Denver Board of Realtors regarding an individual attempting to sell real estate in the City were only local and, therefore, had no adverse effect or impact on interstate commerce.

H. INSURANCE REGULATION

1. United States v. Title Insurance Rating Bureau of Arizona (1981) No. Civ. 80-769 PHX CAM, et al, BNA Antitrust and Trade Regulation Reporter No. 1021, A-3

Insurance companies that filed rates based upon those created by the industry's rating bureau were not protected by the Parker exemption because the State regulated rates nor were they protected by the Noerr/Pennington doctrine because the Court felt that the mere filing of something required by law did not in any way relate to the right to petition.

I. CALIFORNIA ANTITRUST (Cartwright Act)

1. People Ex Rel Freitas v. City & County of San Franciso (1979) 92 Cal.App.3d 913

Cities are exempt from the California antitrust law, the Cartwright Act.

ATTACHMENT B

ANTITRUST PROSECUTIONS
AGAINST LOCAL AGENCY

STATE	ACTIVE OR ANTICIPATED LITIGATION AGAINST LOCAL AGENCY	PRESENTLY NO LITIGATION AGAINST LOCAL AGENCY
ALABAMA		X
ARKANSAS		X
CALIFORNIA		X
CONNECTICUT		X
COLORADO		X
DELAWARE		X
FLORIDA		X
GEORGIA		X
HAWAII		X
IDAHO		X
INDIANA		X
IOWA		X
KANSAS		X
KENTUCKY		X
LOUISIANA		X
MARYLAND		X
MASSACHUSETTS		X
MICHIGAN		X
MISSOURI	X-anticipated	X
MONTANA		X
NEBRASKA		X

STATE	ACTIVE OR ANTICIPATED LITIGATION AGAINST LOCAL AGENCY	PRESENTLY NO LITIGATION AGAINST LOCAL AGENCY
NEVADA		X
NEW HAMPSHIRE		X
NEW JERSEY		X
NEW MEXICO		X
NEW YORK		X
NORTH DAKOTA		X
OHIO		X
OKLAHOMA		X
OREGON		X
PENNSYLVANIA	X-contemplated	X
SOUTH CAROLINA		X
SOUTH DAKOTA		X
TENNESSEE		X
TEXAS		X
VIRGINIA		X
VERMONT		X
WASHINGTON		X
WEST VIRGINIA		X
WISCONSIN		X
UNITED STATES DEPARTMENT OF JUSTICE		X

Note: Not all states responded.

II. SUMMARY OF THE RESULTS OF THE NIMLO SURVEY ON ANTITRUST

BREAKDOWN BY SUBJECT OF ANTITRUST SUITS AGAINST MUNICIPALITIES AND DAMAGES CLAIMED WHERE AVAILABLE

Cable Television Regulation

1. Community Communications v. Boulder, 102 S.Ct. 835 (January 13, 1982).
   Suit based on challenge to moratorium instituted to increase competition among cable television providers.
2. Melhar Corp. v. City of St. Louis, Civ. No. 81-0671c(4) (E.D. Mo. 1981), appealed to 8th Cir. Court of Appeals No. 82-1064 (damages claimed $72,000,000.00). [1]
   Suit concerns revocation of a franchise to operate a cable television franchise.
3. William Danks v. City and County of Denver, No. 82-CV-0484 (D.C. Colo. 1982).
   Action challenges award of an exclusive franchise to operate a cable television system in Denver, Colorado.
4. Hopkinsville Cable TV v. Pennyroyal, C.A. No. 81-0270-P (W.D. Ky. 1982) appealed to 6th Circuit Court of Appeals.
   Suit brought alleging that the award of a franchise after competitive bidding to operate a cable television franchise violated antitrust laws.
5. Affiliated Capital v. City of Houston, 519 F.Supp. 991 (S.D. Tex. 1981).
   Antitrust suit brought challenging the municipal award to various franchisees of contract to operate cable television franchise.
6. Omega Satellite Products v. City of Indianapolis, No. 82-339c (S.D. Ind. 1982) (damages unspecified).
   Antitrust action brought challenging municipal policy of refusing to permit the placing of coaxial cables across public thoroughfares without a franchise.

Land Use and Zoning

1. Scott v. City of Sioux City, No. C79-4009 (No.D. Ia 1979) (damages claimed $15,000.000.00).
   Antitrust action brought by disappointed developers seeking a rezoning of their property, in order to construct a commercial development.
2. Westborough Mall v. City of Cape Girardeau, No. S80-105c (E.D. Mo. 1981) (damages claimed $180,000,000.00).
   Suit brought by disgruntled developers denied a change in zoning to construct a shopping mall.
3. Mason City Center v. City of Mason City, 468 F.Supp. 737 (N.D. Ia. 1979) (damages unspecified).
   Antitrust action alleging that the municipality utilized the zoning laws to hinder the development of a shopping center in order to promote downtown development.
4. Miracle Mile v. City of Rochester, 617 F.2d 18 (2d Cir. 1980) (damages claimed $49,200,000).
   Action brought by developers alleging that the city's petitioning of state and federal agencies in order to insure that the developers complied with applicable environmental regulations constituted a violation of antitrust laws.
5. Richmond Hilton v. City of Richmond, C.A. No. 81-1100R (E.D. Va. 1980) (damages claimed $260,000,000).
   Suits by developers alleging zoning laws were utilized in an anticompetitive manner in order to promote development in a redevelopment area.

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[1] Damages claims are trebled in accordance with antitrust laws.

6. Canal Square v. City of Richmond, C.A. No. 81-1115 (E.D. Va. 1981) (damages unspecified).
   Same facts as above.
7. Cedar Riverside v. U.S., 459 F.Supp. 1290 (D. Minn. 1978), aff'd, 606 F.2d 254 (8th Cir. 1979).
   Action brought challenging actions of redevelopment agency.
8. Aspen Post v. Board of County Commissioners, No. 81-1400 (D. Colo. 1981) (damages claimed $135,000,000.00).
   Suit alleging that various actions taken by municipal officials to limit development violated antitrust laws.
9. Jonnet Development v. City of Pittsburgh, C.A. No. 81-421 (W.D. Pa. 1981), appealed to 3rd Cir. Court of Appeals, No. 81-2182.
   Antitrust suit brought challenging public acquisition of a property for subsequent conveyance to third party in order to promote the redevelopment of the downtown area of Pittsburgh, Pennsylvania.

Waste Collection and Disposal

1. Hybud Equipment v. Akron, 654 F.2d 1187 (6th Cir. 1981) remanded in light of Boulder, 456 U.S. ____ (1982).
   Antitrust action brought contesting municipal ownership and operation of a waste treatment-energy recycling facility.
2. Central Iowa Refuse v. Des Moines, No. 79-32-1 (S.D. Ia.).
   Action brought challenging a municipal cooperative requirement that all solid waste be brought to municipal landfill. Suit has delayed for over one year construction of municipal landfill.

Hospital and Ambulance Services

1. Capital Ambulance v. Columbia, South Carolina, C.A. No. 80-670-6 (D.S.C. 1980).
   Suit brought alleging restraint of trade in operation of private ambulance services.
2. Huron Valley Hospital v. City of Pontiac, 466 F.Supp. 1301 (E.D. Mi. 1979) appealed, C.A. No. 79-1265 (6th Cir. 1981).
   Suit brought alleging that municipal hospital sought to exclude competition in the provision of health care facilities.
3. United Pacific Ventures v. Mercy, Civ. LV. 80-163, RDF (D. Nev. 1981) (damages claimed $1,260,000.00).
   Disgruntled licensee for ambulance service brought suit against the municipality alleging that the denial of a license to operate violated antitrust laws.
4. Gold Cross v. City of Kansas City, Mo., ___F.Supp.___ (W.D. Mo. 1982).
   Antitrust action brought by disappointed licensee objecting to municipality's refusal to issue a license to him to operate an ambulance service.

Water and Sewage Systems

1. Community Builders v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981) (damages claimed $1,536,000.00).
   Antitrust action brought to challenge hook-up fees for provision of municipal water service outside municipal boundaries.
2. Tuld v. City of Scottsdale and City of Phoenix, 665 F.2d 1054 (9th Cir. 1981) ($750,000.00).
   Suit brought challenging municipal charges for water hook-up.
3. Schrader v. Horton, 626 F.2d 1163 (4th Cir. 1980), affirming 471 F.Supp. 1236 (W.D. Va. 1979).
   Antitrust suit challenging compulsory hook-up with municipal water system
4. Howland Township v. City of Warren, C.A. No. 81-954 (N.D. Oh. 1981) (damages claimed $1,890,000.00).
   Antitrust action brought challenging a municipal policy of providing water only to municipal residents.

Airport Services and Concessions

1. Pueblo Aircraft v. City of Pueblo, ___F.2d___ (10th Cir. 1982).
   Antitrust suit brought by an unsuccessful applicant for concession space at a municipal airport.
2. Greyhound v. City of Pensacola, 676 F.2d 1380 (11th Cir. 1982) (damages claimed $1,500,000.00).
   Disgruntled franchisee alleged that denial of a license to operate a rent-a-car facility at the municipal airport violated antitrust laws.
3. Woolen v. Surtran Taxicabs, Inc., 461 F.Supp. 1025 (N.D. Tex. 1978) (damages claimed $9,000,000.00).
   Action brought challenging single operator award for ground transportation at municipal airport.
4. B&W Aero Corp. v. Manchester Airport, Civ. No. 80-427-D (D.N.H. 1981) (damages claimed $3,000,000.00).
   Antitrust action brought challenging the sale of fuel by the municipality at the municipal airport.
5. Pinehurst Airlines v. Resort Air Service, 476 F.Supp. 543 (M.D.N.C. 1979).
   Action brought alleging municipal award of an exclusive grant to a fix based operator violated antitrust laws.
6. Guthrie v. Genesee County, 494 F.Supp. 950 (W.D. N.Y. 1980).
   Suit brought alleging that municipal award of an exclusive operating agreement at the municipal airport violated antitrust laws.

Utility Services

1. Morrow v. Mrs. South, Civ. No. C-3-81-197 (S.D. Oh.) (damages claimed $2,225.000.00).
   Antitrust action brought against city concerning the termination of services for non-payment of utility bill. The city does not even own the utility but is merely the franchisor.
2. City of Gainesville v. Florida Power, 488 F.Supp. 1258 (S.D. Fla. 1980).
   Antitrust suit brought by utility alleging violations of Sherman Act by a consortium of municipalities.
3. City of Groton v. Connecticut Light, 497 F.Supp. 1040 (D. Del. 1980).
   Counterclaim brought alleging that a consortium of cities negotiating for lower rates with the utility violated antitrust laws.
4. City of Newark v. Delmarva, 497 F.Supp. 323 (D. Del. 1980)
   Suit alleging that municipal parties sued and brought administrative actions against a utility in violation of antitrust laws.

Towing Services

1. Sherrer v. City of Huntington Beach, No. CV-80-826-MML (C.D. Cal. 1981).
   Action brought challenging the city's refusal to put a company on its list of eligble companies for police directed towing services.

2. Shurtleff v. San Jose, No. C-81-2717 (N.D. Cal. 1981) (damages claimed $3,000,000.00).
   Antitrust suit brought challenging refusal to include a towing company on the city's rotation list for city-directed towing.
3. Kendrick v. Augusta, Georgia, C.A. No. 179-266 (S.D. Ga. 1981).
   Losing bidder for contract to tow abandoned cars from city streets brought suit, challenging award of contract to successful bidder.

Mass Transit

1. Crocker v. Padnos, 483 F.Supp. 229 (D. Mass. 1980) (damages claimed $1,500,000.00).
   Suit brought challenging the operation of a municipal transit authority.

Licenses and Concessions

1. Cincinnati Riverfront v. City of Cincinnati C.A. No. C-1-82-128 (S.D. Ohio) (damages claimed $3,000,000.00).
   Action by disgruntled bidder for right to operate a parking facility at a municipallly owned sports complex.
2. Kurek v. Park District of Peoria, 557 F.2d 580 (7th Cir. 1977), reinstated 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979).
   Suit brought alleging that various activities of municipality in award of franchise to operate concession business at municipal golf course were in violation of antitrust law.

Land Leasing

1. Spangler v. City of Los Angeles, CV-F-80-283 EDP (E.D. Ca. 1980) (damages claimed $3,680,000.00).
   Action brought alleging that the leasing of public lands constituted an attempt to monopolize under various antitrust laws.

Contracts

1. Suttles v. City of Dayton, No. 76 1055 (Oh. Comm. Pls.) (damages claimed $3,000,000.00).
   Suit involved an award of a contract for security services at a park.

STATEMENT OF SENATOR BOB DOLE

ON THE BOULDER DECISION

MR. CHAIRMAN, AT THE OUTSET I WISH TO APPLAUD YOU FOR YOUR LEADERSHIP AND JUDGEMENT IN CONVENING THIS HEARING FOR IT FOCUSES ON WHAT COULD WELL BECOME ONE OF THE MOST TROUBLING AND DIFFICULT ANTI-TRUST ISSUES OF THE DAY. I REFER TO THE IMPACT OF THE SUPREME COURT'S RECENT DECISION IN COMMUNICATIONS COMPANY, INC. VS. CITY OF BOULDER WHICH HELD THAT LOCAL JURISDICTIONS, IN ORDER TO BE IMMUNE FROM ANTI-TRUST CHALLENGE, MUST HAVE THEIR GOVERNMENTAL ACTIONS SPECIFICALLY AUTHORIZED BY THE STATE LEGISLATURE. UNLESS THE CONGRESS TAKES APPROPRIATE REMEDIAL ACTION IN THE NEAR FUTURE, CITIES AND OTHER LOCAL JURISDICTIONS WOULD BE SWEPT UP IN A VERITABLE BLIZZARD OF LITIGATION. ALTHOUGH THE ANTI-TRUST LAWYERS MIGHT WELCOME THIS PROSPECT, IT WOULD SEEM THAT THE TAXPAYERS AS WELL AS THE AFFECTED GOVERNMENTAL OFFICIALS OUGHT TO BE LESS THAN ENTHUSIASTIC AT THE PROSPECT.

IT IS MY UNDERSTANDING THAT TESTIMONY TO BE RECEIVED TODAY WILL ASSERT THAT THE SUPREME COURT HAS NOW EFFECTIVELY STRIPPED LOCAL GOVERNMENTS OF ANY PROTECTION FROM THE ANTI-

TRUST LAWS. FURTHER, THERE IS AT LEAST SOME DOUBT THAT THE ENTIRE STRUCTURE OF LEGAL RELATIONSHIPS BETWEEN THE SEVERAL STATES AND THEIR POLITICAL SUBDIVISIONS COULD WELL BE SHAKEN. THERE IS MORE THAN A REMOTE POSSIBILITY THAT EVEN THE MOST MUNDANE OF MUNICIPAL FUNCTIONS SUCH AS LICENSING, ZONING AND HEALTH COULD BE SUBJECTED TO COMPLEX COURT CHALLENGES. THESE CHALLENGES COULD PRODUCE DELAY, UNCERTAINTY AND EXPENSE TO THE POINT WHERE ESSENTIAL DEPARTMENTS OF LOCAL GOVERNMENT COULD BE SEVERELY HAMPERED IF NOT PARALYZED.

MR. CHAIRMAN, ALTHOUGH NO SPECIFIC LEGISLATIVE PROPOSAL IS PENDING AT THE PRESENT TIME, THIS SENATOR WILL WELCOME THE OPPORTUNITY TO WORK WITH YOU IN FASHIONING AN APPROPRIATE REMEDY. THE HEARING THIS MORNING WILL RECEIVE TESTIMONY FROM THE JUSTICE DEPARTMENT REPRESENTATIVE, ATTY. GEN. BAXTER, VARIOUS REPRESENTATIVES OF LOCAL GOVERMENT AND THEIR LEGAL REPRESENTATIVES. I WOULD SUGGEST THAT IT WOULD BE APPROPRIATE TO KEEP THE RECORD OPEN SO THAT THE VIEWS OF STATE AND COUNTY GOVERNMENTS COULD ALSO BE OBTAINED. ONCE THE RECORD IS COMPLETE, THEN I URGE PROMPT ACTION TO DEAL WITH THIS PROBLEM.

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